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Critique of Money Judgment Part One: Liens on New York Real Property

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CRITIQUE OF MONEY JUDGMENT

PART ONE: LIENS ON NEW YORK REAL PROPERTY

DAVID GRAY CARLSON[†]

Thus when it is said that a creditor has a right to require his debtor to pay his debt, this does not mean that he can remind the debtor that . . . reason itself puts him under obligation to perform this; it means, instead, that coercion which constrains everyone to pay his debts can coexist with the freedom of everyone, including that of debtors, in accordance with a universal external law. Right and authorization to use coercion therefore mean one and the same thing.—Immanuel Kant¹

INTRODUCTION	1292
I. MONEY JUDGMENTS IN GENERAL	1296
A. Entry	1296
B. Judgment-roll	1297
C. The Docket	1297
1. Lower Courts	1298
2. Federal Courts	1299
II. CREATION OF JUDICIAL LIENS ON REAL ESTATE	1300
A. What Is a Lien?	1300
1. First in Time Is First in Right	1300
2. Second in Time Is First in Right	1302
B. The Birth of the Judicial Lien on New York Real Property	1303
1. The Docketing Lien	1305
a. Its Duration	1305
b. Extension of the Docketing Lien	1307
i. Necessity of a Motion	1307

[†] Professor of Law, Benjamin N. Cardozo School of Law. Thanks to Jeanne Schroeder, Stewart Sterk, Bill Widen, and Chuck Yablon for helping me to theorize parts of this Article. This is the first installment of a two-part study of judicial liens under New York law.

¹ IMMANUEL KANT, *THE METAPHYSICS OF MORALS* 49–50 (Mary Gregor ed., 1996).

ii. Tolling	1309
iii. Motions To Extend During a Bankruptcy	1310
iv. Proper Parties	1313
v. Death of the Judgment Debtor	1313
2. The Levying Lien	1314
3. Duration of a Money Judgment.....	1316
III. THE SALE	1323
A. The Requirement of a Lien	1323
B. Procedural Details.....	1324
C. Sale of Mortgaged Premises	1325
D. What's for Sale?	1327
1. First in Time Is First in Right.....	1327
2. Second in Time Is First in Right	1329
a. Judicial Liens Second in Time.....	1329
b. Purchase Money Mortgages.....	1330
E. Who Owns the Proceeds?	1333
F. Bidding In	1336
G. Constitutional Difficulties	1342
IV. THE RECORDING ACT.....	1349
A. Judgment Creditors Are Not Purchasers.....	1349
B. Good Faith Buyers at Execution Sales.....	1351
V. FUTURE ADVANCES UNDER SENIOR MORTGAGES	1355
VI. RENTS	1358
VII. AFTER-ACQUIRED PROPERTY	1367
VIII. JUDICIAL LIENS AND FRAUDULENT CONVEYANCES.....	1369
IX. HOMESTEAD RIGHTS.....	1383
X. TENANCIES BY THE ENTIRETY	1392
XI. TAX LIENS V. JUDICIAL LIENS	1397
A. Local Property Tax.....	1397
B. Federal Tax Liens	1398
CONCLUSION.....	1406

INTRODUCTION

Personal obligation—otherwise known as tort and contract—dominates the first year law curriculum in America. The fantastic assumption behind these courses is that, if a court awards a money judgment against a defendant, she or at least her insurance company will certainly pay. The civil procedure course is no less deluded. Typically, the course sputters out with the JNOV, or perhaps with perfecting an appeal. The fate of the

money judgment is left off the syllabus, as if judgment debtors never fail to pay.

Debt enforcement, however, is what all of civil procedure aims for.² It is the very *telos* of private law. Yet, the mechanisms of debt enforcement are treated as an embarrassment by civil procedure teachers. They are consigned to a nether world, darkly alluded to, but never discussed openly in class.

Why is the *telos* of private law so pitifully neglected? Undoubtedly, the advent of a federal bankruptcy law in 1898 has discouraged interest in debt enforcement in the state courts. The truly spectacular debtors with substantial assets know how to file a bankruptcy petition in the federal courts. In bankruptcy, a judicial lien obtained upon the debtor's property within ninety days of the bankruptcy petition can be avoided entirely by a bankruptcy trustee.³ Thanks to competition from the federal courts, state enforcement has become a foetid and insalubrious backwater.

Nevertheless, the subject of state debt enforcement has some considerable importance. Practicing lawyers often observe debtors go limp after the money judgment and refuse to pay. This is especially so in family law cases, where spite thoroughly overwhelms paternal obligation, even in the presence of substantial assets. Fortunately for creditors, civil procedure's nether side exists to liquidate debtor assets so that judgments can be paid. Yet, precious little detailed knowledge has been accumulated about the fine points of end game procedure. In New York,⁴ no detailed study of judicial liens on real property

² See DAVID D. SIEGEL, *NEW YORK PRACTICE* 804 (4th ed. 2005) ("In many respects this topic gives law its ultimate test. . . . If [a money] judgment can't be enforced, law is bound to fall several notches in the esteem of the plaintiff, which makes the enforcement of judgments a key moment in a test of this system.").

³ 11 U.S.C. § 547(b)(4)(A) (2000 & Supp. V 2005). The creation of a lien is a transfer of property. *Id.* § 101(54)(A) (2000).

⁴ The New York court system says of itself that is most important jurisdiction for private litigation. *Ehrlich-Bober & Co. v. Univ. of Houston*, 49 N.Y.2d 574, 581, 404 N.E.2d 726, 730, 427 N.Y.S.2d 604, 608 (1980) (referring to New York's "undisputed status as the preeminent commercial and financial nerve center of the Nation and the world"). It has been said that other states like to ape New York and so the knowledge of New York law is tantamount to universal legal knowledge. See Daniel H. Distler & Milton J. Schubert, *Enforcement Priorities and Liens: The New York Judgment Creditor's Rights in Personal Property*, 60 COLUM. L. REV. 458, 458 (1960). In truth, the law of every state is completely different when it comes to enforcing money judgments. As Professor Stefan Riesenfeld once wrote:

has ever been published by a law review. The last study of judicial liens on personal property is over forty years old and in any case precedes the dubious reforms instituted by the New York legislature in the Civil Practice Law and Rules ("CPLR").⁵

In this Article, I hope to fill that gap. This Article is the first installment of an in-depth study of judicial liens in New York. This installment focuses on judicial liens on real property, as regulated by the CPLR.⁶ A sequel covers liens on personal property.⁷ In general, New York's real estate regime radically differs from its personal property regime, thereby justifying the division of labor between this installment and the sequel.

In exploring the nature of the judicial lien on New York real property, I proceed as follows. Part I gives some necessary information about money judgments. Part II discusses the point at which a lien is created and how long it endures—crucial information for understanding the post-judgment enforcement mechanism. Once the lien exists, and only so long as it exists, the sheriff is prepared to sell the property. Part III describes the execution sale, which in New York, is beset with constitutional difficulties that the courts have yet to confront. Part IV describes the status of the judicial lien against unrecorded conveyances. Although it is a nostrum that judgment creditors have no status under New York's recording act, this is not exactly accurate. The sheriff at an execution sale has power to convey free and clear of

Unfortunately, even cursory familiarity with this branch of the law will produce in the student the impression that the field possesses hopeless prolixity and diversification which does not find its match in any other sector of the legal system. The basic reason for this certainly unsatisfactory state of affairs is the unhappy tendency of American jurisdictions on the one hand to cling with amazing tenacity to outmoded preconceptions and traditions of the common law, and on the other hand to give haphazard and unsystematic legislative relief to the pressing needs of the business community.

Stefan A. Riesenfeld, *Collection of Money Judgments in American Law—A Historical Inventory and a Prospectus*, 42 IOWA L. REV. 155, 155 (1957).

⁵ See Distler & Schubert, *supra* note 4, at 458–59.

⁶ Article 52 went into effect on September 1, 1963. Some deliberate reforms were intended; in particular, post-sale redemption powers were abolished as tending to depress bids at execution sales. See David D. Siegel, *The Sale of Real Property Pursuant to an Execution Under the CPLR*, in REPORT OF THE ADMINISTRATIVE BOARD OF THE JUDICIAL CONFERENCE OF THE STATE OF NEW YORK FOR THE JUDICIAL YEAR JULY 1, 1963 TO JUNE 30, 1964 120, 122–23 (1965). This legislation was conceived as mainly codifying prior New York statutes and traditions.

⁷ David Gray Carlson, *Critique of Money Judgment Part II: Liens on New York Personal Property*, 83 ST. JOHN'S L. REV. (forthcoming 2009).

unrecorded conveyances to bona fide purchasers for value who record first. New York case law on this subject, however, is wobbly and mostly over a century old. The best interpretation of it is that the sheriff does indeed have power to sell free and clear of the unrecorded conveyances of the judgment debtor.

Part V discusses the priority of future advances extended by mortgage lenders after judgments are docketed. As we shall see, discretionary advances that the lender need not have made are entitled to priority, but if these sums are advanced with the knowledge that an intervening party will be “squeezed” out of its collateral, courts will apply principles of equitable subordination to protect the intervening party. In spite of some recent legislation designed to facilitate discretionary future advances, it is still probably the rule that mortgage lenders may not deliberately harm judicial lien creditors by prejudicial discretionary advances made after their judicial liens are created.

Part VI discusses acquisitions of real property by debtors after a money judgment is docketed against them. As we shall see, the rule of “first in time is first in right” doesn’t function when two or more judgments are docketed before the debtor inherits or buys real estate. Rather, liens on after-acquired property all attach to the acquisition at the same time. In such cases, New York imposes a rule of pro rata sharing. Part VII describes the disturbing New York rule when a debtor fraudulently conveys away real property before a creditor obtains a judicial lien. The New York rule seems to be that docketing a judgment against the debtor is also docketing against the debtor’s transferee, a rule I will criticize as planted in the uncertain soil of metaphoric confusion. The rule, if taken seriously, creates havoc for title searchers.

Part VIII considers the right of New York debtors to claim a \$50,000 homestead. It turns out that New York has some irksome case law that deprives the debtor of her homestead in the near-universal case where the homestead is encumbered by a mortgage. Bankruptcy is needed to rescue New York residents from some bad state law. Part IX considers an *ersatz* homestead exemption in New York—the tenancy by the entirety. Although creditors of individual spouses can supposedly reach his or her property interests in such a tenancy, New York courts (especially in Nassau County) have used their discretion to put the tenancy

by the entirety off limits to creditors. Finally, Part X considers the fate of the New York judicial lien on real property if the Internal Revenue Service ("IRS") claims a lien for unpaid taxes. The United States Supreme Court, ever puckish on the subject of private law, has been up to mischief of late, holding that the IRS beats any judicial lien on after-acquired property of the debtor. I will take a detailed look at *United States v. McDermott*,⁸ to show that it was incorrectly decided and what it means for New York money judgments.

Finally, I conclude by setting forth a program of modest legislative reform, designed to cancel some small number of the absurdities that plague and embarrass the current system.

I. MONEY JUDGMENTS IN GENERAL

According to CPLR 5011, a judgment is "the determination of the rights of the parties in an action or special proceeding and may be either interlocutory or final."⁹ A *money* judgment is defined as "a judgment, or any part thereof, for a sum of money or directing the payment of a sum of money."¹⁰

The key points in the life of a money judgment are entry, judgment-roll, and docketing. Each of these moments merits scrutiny.

A. *Entry*

Typically, the winning side of a law suit drafts the judgment for the judge to sign. Once this is done, the judge sends it to the clerk's office for "entry." Entry of the judgment occurs when the clerk signs it and files it in a chronologically organized file called the "judgment book."¹¹ Only after entry is a money judgment enforceable.¹²

⁸ 507 U.S. 447 (1993).

⁹ A "special proceeding" need not detain us. This refers to an action under article 78 of the CPLR and covers actions against government officials. N.Y. C.P.L.R. 7801 (McKinney 2008). Our concern is with money judgments, which will typically be a very simple statement that the defendant owes the plaintiff a sum of money. See also *id.* 105(k) ("The word 'judgment' means a final or interlocutory judgment.").

¹⁰ *Id.* 105(q).

¹¹ *Id.* 5016(a).

¹² *Musso v. Ostashko*, 468 F.3d 99, 106 (2d Cir. 2006).

B. Judgment-roll

The judgment-roll is the record of the litigation—the stuff that dreams of *res judicata* are made of. It contains the summons, pleadings, admissions, and orders “involving the merits or necessarily affecting the final judgment.”¹³ The attorney for the winning side is assigned the merry task of preparing the judgment-roll.¹⁴ It is “filed by the clerk when he enters judgment.”¹⁵ That is to say, it may not be filed *before* entry of the judgment. The time of the judgment-roll is key for defining the duration of judicial liens on real estate.¹⁶ Accordingly, the clerk must state the date and time of its filing.¹⁷

C. The Docket

Docketing consists of the clerk putting the judgment into an alphabetical file by name of the defendants.¹⁸ Once docketed, the judgment becomes searchable. As we shall see, docketing is the moment when a judicial lien arises on real property.¹⁹ Title searchers are therefore much concerned with the docket.

The docket is the nerve and bone of the bookkeeping system that the New York courts operate to monitor the satisfaction of judgments. The basic concept is that, every time the sheriff²⁰ obtains funds from the judgment debtor (“JD”),²¹ the sheriff

¹³ N.Y. C.P.L.R. 5017(b).

¹⁴ *See id.* 5017(a).

¹⁵ *Id.*

¹⁶ *Id.* 5203(a) (stating that liens die ten years after the judgment roll is filed).

¹⁷ *Id.* 5017(a).

¹⁸ The entry under the first named defendant must include the amount of the judgment, the date and time of the judgment roll, the court in which the judgment was entered, etc. *Id.* 5018(c)(1). The entries for additional defendants contain a cross-reference to the first-named defendant. *Id.* 5018(c)(2).

¹⁹ *Id.* 5203(a).

²⁰ *Id.* 105(s-1) (“The term ‘the sheriff,’ as used in this chapter, means the county sheriff as defined in subdivision (a) of section thirteen of article thirteen of the constitution and in counties in the city of New York, the city sheriff as defined in [NEW YORK, N.Y., CHARTER ch. 58, § 1526 (Command Information Services 2001)]. For the purposes of article fifty-two of this chapter relating to the enforcement of money judgments and for the purposes of any provision of law which in effect applies any such provision of article fifty-two of this chapter, such term shall also mean any ‘city marshal’ as defined in article sixteen of the New York city civil court act, except that city marshals shall have no power to levy upon or sell real property and city marshals shall have no power of arrest.”). This provision goes out of effect on June 30, 2009, unless the Legislature has wit enough to extend it.

²¹ N.Y. C.P.L.R. 105(m).

reports back to the clerk who first entered the judgment. This clerk notes the amount of the payment, so it is always possible to tell from the docket the amount *JD* actually owes.²²

Where *JD* pays the judgment creditor²³ ("*JC*") directly, *JC* is required to file a "satisfaction-piece" with the clerk, so that the docket accurately reflects the amounts *JD* actually owes.²⁴

1. Lower Courts

The chief judicial bookkeeper in New York is the county clerk. The county clerk is the clerk of the supreme court, which is organized in every county in New York. This clerk also services the county court, if any.²⁵ Accordingly, creditors who have judgments from courts other than the supreme or county court are expected to obtain transcripts of their judgments and file these transcripts with the county clerk.²⁶ The county clerk then notifies the clerk issuing the transcript that the transcript has been docketed, and this lesser clerk humbly notes the docketing on his or her own file.²⁷ The significance of docketing with the supreme court is that only *this* docketing creates the lien on real estate located within the county where the supreme court is located.²⁸ In addition, the power of enforcement officers of the lower court to execute is eclipsed by the sheriff's exclusive

²² *Id.* 5021(b).

²³ *Id.* 105(l) ("A 'judgment creditor' is a person in whose favor a money judgment is entered or a person who becomes entitled to enforce it.").

²⁴ *Id.* 5020(a). The scant penalty of \$100 is imposed if the judgment creditor does not file a satisfaction-piece within twenty days after receiving full satisfaction. *Id.* 5020(c). A slander of credit action may lie if the judgment creditor fails to file. See *Jimenez v. Shippy Realty Corp.*, 163 Misc. 2d 121, 124, 618 N.Y.S.2d 963, 965 (Sup. Ct. Westchester County 1994) (finding statute of limitations for slander and equitable actions had run).

²⁵ See N.Y. COUNTY LAW § 525 (McKinney 2008). The boroughs of New York City have city courts, rather than county courts.

²⁶ N.Y. C.P.L.R. 5018(a). The clerk of the supreme court is also the clerk of the county court, so that no new docketing from the county court to the supreme court is necessary. N.Y. COUNTY LAW § 525; *In re Sterling Die Casting Co.*, 132 B.R. 99, 100 (Bankr. E.D.N.Y. 1991).

²⁷ See N.Y. C.P.L.R. 5018(a).

²⁸ *Id.* 5203(a). In *The Lambs, Inc. v. Diven*, No. 2941/2001, 2001 N.Y. Misc. LEXIS 1259, at *8 (N.Y. Civ. Ct. N.Y. County Sept. 7, 2001), the court thought it could not order the sale of cooperative shares per 5206(e). This seems wrong. Cooperative shares are deemed personal property in New York. *E.g.*, *State Tax Comm'n v. Shor*, 43 N.Y.2d 151, 154, 371 N.E.2d 523, 524–25, 400 N.Y.S.2d 805, 806 (1977). The sale could have proceeded.

jurisdiction, once the judgment is docketed with the supreme court clerk.²⁹

2. Federal Courts

Creditors with federal judgments must also file with the clerk of the supreme court, if they wish to have liens on New York real property. Federal Rule of Civil Procedure 64 authorizes federal marshals to receive and enforce writs of execution according to the state law where the federal court is located.³⁰ But executions as such create no liens on New York real property.³¹ Therefore, it is prudent for federal judgment creditors to docket with the supreme court, if the defendant owns real property.³² Only this docketing³³ creates a lien for a federal *JC*.³⁴

CPLR 5018(b) permits filing of federal transcripts only with regard to "the judgment of a court of the United States rendered or filed within the state."³⁵ Where the district court in New

²⁹ *Schleimer v. Gross*, 46 Misc. 2d 931, 932, 261 N.Y.S.2d 670, 672 (Sup. Ct. Nassau County 1965); 54 N.Y. JUR. 2D *Enforcement and Execution of Judgments* § 70 (2008).

³⁰ *See, e.g., Am. Express Travel Related Servs. Co. v. Kalish & Rice, Inc.*, 693 F. Supp. 1436, 1438–39 (S.D.N.Y. 1988).

³¹ *See* N.Y. C.P.L.R. 5203(a) (indicating that only local docketing with the county clerk or levying creates a lien).

³² Unlike state *JCs* in other counties who must docket in the home county and docket again in the county where the real property is located, federal *JCs* can docket in the county where the real property is located as soon as the federal judgment is entered. *In re Sterling Die Casting Co.*, 132 B.R. 99, 104 (Bankr. E.D.N.Y. 1991).

³³ It is possible for a federal marshal to *levy* on real property, but because of severe restrictions on the levying option, this seems never to have been done. *See infra* text accompanying notes 104–111.

³⁴ In *Sterling*, *JC*'s federal judgment was docketed with the federal clerk ninety-seven days before *JD*'s bankruptcy. *See Sterling*, 132 B.R. at 100. The judgment was docketed with the clerk of the New York Supreme Court eighty-five days before the bankruptcy. *JC*'s judicial lien was therefore declared a voidable preference. *JC* tried to argue that section 5018(b) ("upon such filing the clerk shall docket . . . with the same effect as a judgment entered in the supreme court within the county") provided for a relation-back of the judicial lien to the time of the federal docketing, but this was properly rejected on the plain wording of the statute. Any other holding would have wreaked havoc with title searching. *Id.* at 103.

³⁵ The effect of federal judgments on real estate is limited by 28 U.S.C. § 1962 (2000), which provides:

Every judgment rendered by a district court within a State shall be a lien on the property located in such State in the same manner, to the same extent and under the same conditions as a judgment of a court of general jurisdiction in such State, and shall cease to be a lien in the same manner and time. This section does not apply to judgments entered in favor of the

Jersey, for example, renders judgment against *JD* with real estate in New York, *JC* will have to obtain local recognition of the judgment under article 54 of the CPLR, which is slightly more procedurally demanding than proceeding under article 50.³⁶

II. CREATION OF JUDICIAL LIENS ON REAL ESTATE

A. *What Is a Lien?*

1. First in Time Is First in Right

The creation of a lien is the transsubstantial moment at which a plaintiff's in personam right graduates into a right in rem. At this point, the plaintiff with a money judgment becomes a property owner. The name of the plaintiff's property interest is a lien. It is commonly called a judicial lien or judgment lien to differentiate it from consensually created liens (mortgages or security interests) or tax liens.³⁷

A lien is a power of sale. Classically, it is the power to sell *whatever the debtor could have sold at the time the lien was created*. This formulation of the power to sell is vital to all that follows. Notice that the power has a temporal aspect to it. The power of sale is adjudged at the time the lien was created. In all lien regimes, the moment of a lien's birth is key.³⁸

United States. Whenever the law of any State requires a judgment of a State court to be registered, recorded, docketed or indexed, or any other act to be done, in a particular manner, or in a certain office or county or parish before such lien attaches, such requirements shall apply only if the law of such State authorizes the judgment of a court of the United States to be registered, recorded, docketed, indexed or otherwise conformed to rules and requirements relating to judgments of the courts of the State.

Prior to the enactment of the predecessor to this statute in 1888, a federal judgment created a direct lien on real estate. *See Rhea v. Smith*, 247 U.S. 434, 441 (1927).

³⁶ *See Keeton v. Hustler Magazine*, 815 F.2d 857, 860 (2d Cir. 1987); *see also United States v. Pearson*, 258 F. Supp. 686, 690-91 (S.D.N.Y. 1966) (holding that a Virgin Islands District Court judgment could not be filed with the clerk per N.Y. C.P.L.R. 5018(b)).

³⁷ *See* 11 U.S.C.A. § 101(36) (West 2008) ("The term 'judicial lien' means lien obtained by judgment, levy, sequestration, or other legal or equitable process or proceeding.").

³⁸ The drafters of the CPLR everywhere forget the fact that the owner of property encumbered by the judicial lien may well not be *JD*. *E.g.*, N.Y. C.P.L.R. 5203(b) (McKinney 2008) (providing that a motion to extend life of docketing lien requires service of notice on the judgment debtor only). One court has hinted that movants under section 5203(b) had better serve the owner of the property to which

Let us rehearse the above formula in a few very basic scenarios.

First Scenario

t_1 : D owns a fee simple absolute estate in Blackacre. D grants A a mortgage (which A promptly records).

t_2 : A declares a default and holds a foreclosure sale, where X is the buyer.

At t_2 , A has the power to sell whatever D had at the time A 's lien was created. Since D had fee simple absolute at t_1 , X buys fee simple absolute at t_2 . Just prior to X 's purchase, A owned a mortgage and D owned the equity—the right to possess, redeem, etc. In effect, X buys A 's mortgage and D 's equity. These merge into a fee simple estate owned by X . After the sale at t_2 , neither A nor D own anything. Their interests have been sold to X , who has paid cash for this title. A and D will have a claim to the proceeds X has paid in. As to the proceeds, the rule is “first in time is first in right,” with the proviso that the residual owner (D) is always the last taker after all D 's transferees have been paid.

Let us now add a second lien creditor.

Second Scenario

t_1 : D owns a fee simple absolute estate in Blackacre. D grants A a mortgage (which A promptly records).

t_2 : The clerk of the supreme court in the county where Blackacre is located docketts a judgment in favor of JC . JC therefore has a judicial lien on D 's real property.³⁹

t_3 : A declares a default and holds a foreclosure sale, where X is the buyer.

In the Second Scenario, D has made a junior transfer to JC (involuntarily, by operation of law). Yet, JC is subject to A 's senior mortgage. A 's power of sale cannot be affected by D 's subsequent transfers. Therefore, at t_3 , X still buys fee simple absolute, because that is what D had at t_1 (even though D had less than that after t_2). This time, proceeds go to A first and JC second, according to the principle of “first in time is first in

the judicial lien attaches, though the statute does not require it. *G. Roma Roofing Co. v. Marcotrigiano*, 156 A.D.2d 638, 639, 549 N.Y.S.2d 137, 137–38 (2d Dep't 1989).

³⁹ See N.Y. C.P.L.R. 5203(a).

right." *D*, as the residual equity owner, is in last place, once *A* and *JC* are paid in full.

Finally, we analyze the situation where *JC* is the first to sell.

Third Scenario

*t*₁: *JD* owns a fee simple absolute estate in Blackacre. *JD* grants *A* a mortgage (which *A* promptly records).

*t*₂: The clerk of the supreme court docket *JC*'s judgment in the county where *JD*'s real property is located. *JC* therefore has a judicial lien on *JD*'s real property.

*t*₃: *JC* serves an execution on the sheriff, who schedules a sale. At the sale, *Y* is the buyer.

*t*₄: *A* declares a default and holds a foreclosure sale, where *X* is the buyer.

At *t*₃, *JC*, a junior lien creditor, is the first to sell. At this sale, *JC* (via the agency of the sheriff) has the power to sell whatever *JD* had at *t*₂—a fee simple estate encumbered by *A*'s mortgage. So *Y* buys *JD*'s equity interest subject to *A*'s mortgage. At *t*₃, *JC*'s lien disappears, as does *JD*'s interest in the equity. Both *JC* and *JD* have a claim to the proceeds *Y* has paid at *t*₃. *A* has no such claim, as *A* didn't sell anything to *Y*. *A*'s mortgage survives the sale at *t*₃, as *JC* had no right to sell free of *A*'s mortgage.

A second sale occurs at *t*₄, at which time *JD* no longer has any interest in Blackacre. *JD*'s interest was sold to *Y* at *t*₃. So just before *t*₄, *A* owns a mortgage and *Y* owns the equity (which *Y* bought at *t*₃). These disappear into *X*'s fee simple absolute estate, purchased at *t*₄. The proceeds go first to *A*. *Y*, the residual owner of the equity, is in last place with regard to the proceeds.

In the above scenario, *A* and *JC* had the power to sell whatever *JD* had at the time their liens were created. *A* has the power to sell what *JD* had at *t*₁ (fee simple absolute). When *A* sells at *t*₄, *A* sells the full fee simple absolute. When *JC* sells at *t*₃, *JC* sells fee simple as encumbered by *A*'s mortgage. So *JC*'s power was less than—subordinate to—that of *A*. This formulation honors the concept of first in time is first in right.

2. Second in Time Is First in Right

Often, for policy reasons, lien regimes empower a debtor to destroy a lien in order to encourage its publication (or "perfection," to use the phrase favored by the Uniform Commercial Code). At these moments, the party that is second in time is first in right. For example:

Fourth Scenario

*t*₁: *D* owns a fee simple absolute estate in Blackacre. *D* grants *A* a mortgage. *A* does not record it.

*t*₂: *D* conveys all right, title and interest to *X*, who pays a fair price and who has no knowledge of *A*'s unrecorded mortgage. *X* promptly records her deed.

According to New York's recording act, an unrecorded conveyance (such as *A*'s mortgage)

is void as against any person who subsequently purchases . . . the same real property . . . in good faith and for a valuable consideration, from the same vendor or assignor . . . whose conveyance . . . is first duly recorded⁴⁰

Since *X* is a good faith purchaser who has recorded and who purchased with no knowledge of *A*, *X* takes free of *A*'s mortgage. *X* was second in time but first in right.

When it comes to judicial liens, we shall see that the CPLR creates both the rule of "first in time is first in right" and the rule of "second in time is first in right." *JC*₁ might be first in time, but *JC*₂ can sell free of *JC*₁ and might conceivably have priority to the proceeds.⁴¹

B. The Birth of the Judicial Lien on New York Real Property

A lien is the power to sell whatever the debtor had at a specific time—the time of lien creation. So the birth of the lien is the all-important datum. It is the time at which in personam rights of the creditor become in rem rights. It is here that the mediocre fields of tort and contract give way to the nobler realm of property.

This moment is established in the preamble to CPLR 5203(a). The wording of this establishment is confusing, and it pays to quote it at length:

No transfer of an interest of the judgment debtor in real property . . . is effective against the judgment creditor either from the time of the docketing of the judgment with the clerk of the county in which the property is located . . . or from the time of the filing with such clerk of a notice of levy pursuant to an execution until the execution is returned⁴²

⁴⁰ N.Y. REAL PROP. LAW § 291 (McKinney 2008).

⁴¹ See *infra* text accompanying notes 179–187.

⁴² N.Y. C.P.L.R. 5203(a).

This sentence does not directly state that *JC* has a lien on real property⁴³ after certain points of time.⁴⁴ Rather, it says that, *after* those times, no *other* transfer is good against *JC*. Nevertheless, the implication is that *JC* has *something* after two particular points in time. This something we may as well call a lien. The drafters of the CPLR were loathe to utter this shibboleth.⁴⁵ Only in CPLR 5208 and CPLR 5236(a), (c), and (e) are the dreaded name of "lien" spoken.

The two points at which liens are created are local docketing⁴⁶ or, alternatively, levying. So there are in fact two different judicial liens on real property in New York.⁴⁷ These two points presuppose, however, that the debtor already owns the

⁴³ Real property includes leasehold interests in land. N.Y. C.P.L.R. 105(s); *Alternate Energy Mgmt. Corp. v. Goodman*, 151 A.D.2d 453, 453, 542 N.Y.S.2d 242, 243 (2d Dep't 1989).

⁴⁴ The statute resists saying that *JC* has a lien as of a certain time. This was not always the case. *H.R. & C. Co. v. Smith*, 242 N.Y. 267, 269-71, 151 N.E. 448, 449 (1926) (recounting the predecessors of N.Y. C.P.L.R. 5203(a)).

⁴⁵ Two authors complain about the vagueness of the word "lien." "Principal among the numerous factors that have created the present confused situation in New York is the inadequacy of legal terminology. For example, the single term 'lien' has been used regularly by the courts to define vastly different rights." Distler & Schubert, *supra* note 4, at 459. The authors then give examples: sometimes A's lien means that A's right to a specific asset is better than B's right. Sometimes it means that A's right to all a debtor's assets is better than B's rights. I think the threshold for confusion must have been lower in 1960 than it is today. Why are these examples confusing? There's nothing wrong with the word "lien." It's rather like complaining about the phrase "security interest." Article 9 experts have never had difficulty with the term. Nor will we have the slightest inconvenience from our use of the word "lien."

⁴⁶ The docketing lien, at least, dates back to the early days of New York state history. According to New York's English heritage, real property could be used to satisfy money judgments under the writ of *elegit*. *Hulbert v. Hulbert*, 216 N.Y. 430, 435-37, 111 N.E. 70, 71-72 (1916). No sale was possible under this writ. Rather the writ gave the judgment creditor a term for years over half the debtor's land of sufficient duration that the creditor could raise the cash to satisfy the judgment, presumably by collecting rent from the subtenants. New York initially followed this rule in the colonial period, but in 1787 authorized the sale of land. *Id.*, 111 N.E. at 71-72. The lien representing the right of sale dated from docketing the judgment. *Id.*, 111 N.E. at 71-72. Initially, there could be no enforcement against real estate until the creditor had tried and failed to levy on personal property. *Stewart v. Beale*, 7 Hun. 405 (N.Y. Sup. Ct. 1876). The CPLR no longer contains this requirement.

⁴⁷ By fiat, cooperative apartments are deemed to be personal property, not real property, even though ownership of a cooperative apartment involves a leasehold grant to the owner of cooperative shares. *State Tax Comm'n v. Shor*, 43 N.Y.2d 151, 154, 371 N.E.2d 523, 524-25, 400 N.Y.S.2d 805, 806 (1977); cf. N.Y. REAL PROP. LAW § 339-g (McKinney 2008) (defining condominiums as real property).

real property in question when the docketing or levy occurs.⁴⁸ For “after-acquired property,” the rules are much different and will be discussed separately.⁴⁹

1. The Docketing Lien

By far, the more important of New York’s two liens on real property is the docketing lien. CPLR 5203(a) makes clear that *local* docketing is what counts—“docketing of the judgment with the clerk of the county in which the property is located.”⁵⁰ Where the judgment is entered in a court different from the supreme or county court, the lien arises only when a transcript of the judgment is filed with the county clerk.⁵¹

a. *Its Duration*

The docketing lien has a shelf life of no more than ten years. According to CPLR 5203(a), no transfer is good against *JC* after local docketing “until ten years after filing of the judgment-roll.”⁵²

There is a tricky but important aspect to the duration of the docketing lien. It would be an error to think that the docketing lien lasts ten years. Rather, it lasts for ten years from the filing of the judgment-roll.⁵³ Where docketing occurs the same day as the filing of the judgment-roll, the duration of the docketing lien will *approach* (but never reach) ten years.⁵⁴ And the lien’s duration can be considerably less than ten years.

⁴⁸ There are also some exceptions. When the judgment is entered after the death of *JD*, no lien arises. N.Y. C.P.L.R. 5203(a)(4). Nor is there a lien when the decedent’s executor is made a party purely in her representative capacity. *Id.* 5203(a)(6); *Manhanaim Resort Corp. v. Samples*, 156 A.D.2d 342, 344, 548 N.Y.S.2d 295, 297 (2d Dep’t 1989). This provision “operates in such a way so as to defer to the Surrogate’s Court the disposition of all claims against an estate and to render all claimants, including judgment creditors, subject to the jurisdiction and proceedings of the Surrogate’s Court.” *Salomon Bros. Realty Corp. v. McFarland (In re McFarland)*, No. 262853, 2005 WL 742294, at *1 (Sur. Ct. Nassau County Mar. 31, 2005).

⁴⁹ See *infra* text accompanying notes 362–364.

⁵⁰ N.Y. C.P.L.R. 5203(a).

⁵¹ See *Alternate Energy Mgmt. Corp. v. Goodman*, 151 A.D.2d 453, 453, 542 N.Y.S.2d 242, 243 (2d Dep’t 1989).

⁵² N.Y. C.P.L.R. 5203(a).

⁵³ This duration dates back well into the nineteenth century. See, e.g., *Faneuil Hall Nat’l Bank v. Bussing*, 147 N.Y. 665, 665–66, 42 N.E. 345, 346 (1895).

⁵⁴ See *Quarant v. Ferrara*, 111 Misc. 2d 1042, 1042–43, 445 N.Y.S.2d 885, 886–87 (Sup. Ct. Queens County 1981).

Though this be madness, there is method in it. The New York system of accounting for judgments requires that a single county clerk be the master cypher for purpose of determining whether the judgment is paid. This is the clerk of the county where the money judgment was actually entered. Where the judgment is from the supreme or county court, it is with this clerk that the judgment-roll must be filed. Where a lower court entered the judgment, the judgment-roll must be filed with the lower court, but a separate docketing with the supreme court clerk is needed to create the docketing lien.⁵⁵ Once this is accomplished, executions may be issued to sheriffs throughout the state,⁵⁶ but the sheriff is instructed to return the execution to the clerk of the county wherein the judgment was entered.⁵⁷ It is this clerk who reports definitively the outstanding amount of the judgment.

Meanwhile, title searchers can draw comfort from the duration rule. Instead of searching throughout all sixty New York counties, a title searcher can check the docket of the court in which the judgment is entered. If the title searcher observes that ten years have passed since the filing of the judgment-roll, then she knows that, even if there have been recent local docketings, no lien on real property is associated with them. It may well be that the transcript of a judgment in County X was filed last year. Without more, it would appear that this local docketing creates a lien on real property of the debtor in County X. But if more than ten years has lapsed from the time the judgment-roll was filed, the title searcher knows that local docketing in County X implies no lien.

Reference has been made to filing transcripts of judgments in other counties.⁵⁸ If *JC* has a judgment in County X, she can docket her judgment in fifty-nine other counties as well. But the life of these other docketing liens will be less than ten years. All liens die ten years after the judgment-roll.

⁵⁵ *Id.* at 1043, 445 N.Y.S.2d at 886.

⁵⁶ N.Y. C.P.L.R. 5230(b).

⁵⁷ *Id.* 5230(c).

⁵⁸ See *supra* text accompanying notes 25–34.

b. *Extension of the Docketing Lien*

i. *Necessity of a Motion*

The docketing lien can be extended if *JC* delivers an execution in the waning days of the lien's life. By making a motion under CPLR 5203(b), *JC* can extend the docketing lien "for a period no longer than the time . . . necessary to complete advertisement and sale of real property in accordance with section 5236, pursuant to an execution delivered to a sheriff."⁵⁹ We now confront our first major absurdity in the CPLR. According to CPLR 5236(a), such a motion may not be necessary:

[T]he interest of the judgment debtor in property which has been levied upon under an execution delivered to the sheriff or which was *subject to the lien of the judgment at the time of such delivery* shall be sold by the sheriff pursuant to the execution at public auction⁶⁰

The literal meaning of this sentence is that service of the execution while the lien exists authorizes the sheriff to sell, even if the lien has lapsed by the time of the sale. Or to say the same thing in different words, the execution extends the life of the docketing lien.⁶¹ But if this is true, why did the legislature waste valuable time enacting CPLR 5203(b)? The matter remains, in the main, a mystery.⁶²

Possibly one court may have relied on this lien-extending aspect of 5236(a) to award priority to a *JC* whose docketing lien had died by the time of the sale. In *Kazmeroff v. Ehlinger*,⁶³ the following chronology was presented:

⁵⁹ N.Y. C.P.L.R. 5203(b). This provision also permits a motion where enforcement of the judgment has been enjoined by an injunction for some time. See *infra* text accompanying notes 65–81. If there has been neither an execution served on the sheriff nor an injunction, the section 5203(b) motion must be denied. *N. Fork Bank v. Sawicki*, 23 A.D.3d 632, 632, 804 N.Y.S.2d 415, 415–16 (2d Dep't 2005).

⁶⁰ N.Y. C.P.L.R. 5236(a) (emphasis added).

⁶¹ But see *Place v. Albanese*, 73 Misc. 2d 638, 639, 342 N.Y.S.2d 699, 701 (Sup. Ct. Fulton County 1973).

⁶² Section 5203(b) of the CPLR also applies if execution is stayed by an injunction, so its existence is not entirely a superfluity.

⁶³ 43 Misc. 2d 942, 252 N.Y.S.2d 560 (Sup. Ct. Nassau County 1964).

t_1 : JC_1 docketed.⁶⁴

t_2 : JC_2 docketed.

t_3 : JC_1 serves an execution.

t_4 : JC_1 's docketing lien dies.

t_5 : JC_2 serves an execution.⁶⁵

t_6 : Sale.

The *Kazmeroff* court awarded priority to JC_1 , even though JC_1 's lien was dead at the time of the sale.⁶⁶ The case can be explained if the service of the execution itself extended the lien until the end of the execution sale, a result that accords with common sense and the language of the CPLR. Just as litigation that commences one day before a statute of limitations runs can continue after lapse, so should an execution delivered to the sheriff while the docketing lien still lives authorize the sheriff to continue with the sale.

Disappointingly, the *Kazmeroff* court's expressed justification for its decision is mystifying. JC_2 claimed that JC_1 's priority depended on extension of his lien pursuant to CPLR 5203(b). The court rejected the notion, observing that the section was "designed for the protection of a purchaser, creditor or mortgagee in good faith . . . and was intended to protect such persons who would not otherwise have notice of a pending levy and Sheriff's sale."⁶⁷ What this comment seems to be getting at is this: Suppose D had granted A a mortgage just after t_4 . If A had no knowledge that JC_1 had served an execution on the sheriff prior to the death of the lien, A should be entitled to a senior lien, unless JC_1 moves to extend the lien. Or if JC_3 had docketed a judgment after t_4 , JC_3 should be entitled to priority over JC_1 unless JC_1 had previously moved to extend. But, said the *Kazmeroff* court, JC_2 knew of the service of the execution and

⁶⁴ Of course, it is the job of the county clerk to docket. She would rather object if JC_1 went behind the counter and began altering the records. Nevertheless, to save words, I will refer to JC_1 as docketing.

⁶⁵ See *Kazmeroff v. Ehlinger*, 43 Misc. 2d 942, 943, 252 N.Y.S.2d 560, 561 (Sup. Ct. Nassau County 1964). Also on this day, the sheriff filed notice of levy pursuant to section 5235. *Id.* at 943, 252 N.Y.S.2d at 560-61. But that provision requires the sheriff to wait until the docketing lien is dead before levying. N.Y. C.P.L.R. 5235. If *Community Capital Corp. v. Lee* is to be believed, no lien would arise as a result of this levy. 58 Misc. 2d 34, 36, 294 N.Y.S.2d 336, 338 (Sup. Ct. Nassau County 1968); see also *infra* text accompanying notes 123-137.

⁶⁶ *Accord* *Gaglione v. Mahoney*, 306 A.D.2d 279, 280, 760 N.Y.S.2d 350, 351 (2d Dep't 2003).

⁶⁷ *Kazmeroff*, 43 Misc. 2d at 944, 252 N.Y.S.2d at 561-62.

so was not entitled to priority.⁶⁸ The point makes no sense whatever. CPLR 5203(b) requires only that *JD* be served with notice, either by personal service or registered or certified mail.⁶⁹ How does the motion to extend put *A* or *JC*₃ on notice that *JC*₁'s lien extends beyond its natural life? Furthermore, nothing in the CPLR makes *JC*₂'s priority turn on *JC*₂'s knowledge. This factor should have played no part in the court's reasoning.

ii. Tolling

A debtor may file for bankruptcy in the waning days of the docketing lien, in which case bankruptcy's automatic stay⁷⁰ prevents the service of the execution. Is there a tolling principle that applies to extend the life of the lien? Courts are divided on this question.

In *Gratton v. Dido Realty Co.*,⁷¹ the court held against tolling, on the following chronology:

*t*₁: *JC* obtains entry of a money judgment (and presumably files the judgment-roll) in Queens County.

*t*₂: *JC* docket in Nassau County, where *JD* had real property.

*t*₃: *JD* files for bankruptcy.

*t*₄: *JD* obtains a bankruptcy discharge a year later.

*t*₅: Tenth anniversary of *t*₁.

*t*₆: *D* serves an execution on the Nassau sheriff, six days after *t*₅.

We are not told the duration of the automatic stay on *D*'s real property. If *D*'s property was overencumbered by mortgages and judicial liens, the trustee will have abandoned the property, at which point the stay would lapse once *JD* received the discharge at *t*₄.⁷² If tolling were a valid New York principle, then, so long as the trustee retained an interest in the property for more than six days after *t*₃ (as is extremely likely), *JC*'s execution would have been timely delivered. The *Gratton* court, however, ruled that *JC*'s lien died at *t*₅, ten years after the judgment roll was filed. It therefore stands against the existence of a tolling principle.

In contrast, the court in *Barer v. Berzak*⁷³ ruled that the *JC*'s right to move for an extension was extended by the automatic

⁶⁸ See *id.* at 944, 252 N.Y.S.2d at 562.

⁶⁹ N.Y. C.P.L.R. 5203(b).

⁷⁰ 11 U.S.C. § 362(a)(2) (2000).

⁷¹ 139 Misc. 2d 724, 725, 528 N.Y.S.2d 769, 770 (Sup. Ct. Queens County 1988).

⁷² 11 U.S.C. § 362(c)(1)-(2).

⁷³ No. 9553/92, 2001 N.Y. Misc. LEXIS 519, at *5 (Sup. Ct. Nassau County July 16, 2001).

stay. Pending the motion, the docketing lien died at t_5 , the tenth anniversary of the judgment-roll. But if *JC* made a timely motion, the lien, once dead, would live again. So, using the *Gratton* chronology, had *JC* moved to extend at t_6 and if the motion had been granted, service of the execution any time before the first anniversary of t_4 would have been timely, and the execution sale could proceed.⁷⁴

Which of these two views is correct? Section 5203(b) does not expressly require the motion to be made during the life of the execution lien.⁷⁵ There is no clear obstacle to the *Barer* interpretation, which insinuates a tolling principle into the life of the docketing lien.⁷⁶

iii. Motions To Extend During a Bankruptcy

Suppose *JC*₁ moves to extend her lien during *D*'s bankruptcy. Has *JC*₁ violated bankruptcy's automatic stay? Of course, enforcing the lien violates the stay.⁷⁷ Our concern for the moment is simply whether the extension motion under CPLR 5203(b) can be made without offense to the stay.

The answer is yes. Section 546(b)(1) of the Bankruptcy Code subordinates bankruptcy trustees to state laws that provide for "the maintenance or continuation of perfection of an interest in property to be effective against an entity that acquires rights in such property before the date on which action is taken to effect such maintenance or continuation."⁷⁸ And section 362(b)(3) of the Bankruptcy Code expressly permits "any act to . . . maintain or

⁷⁴ *Gratton*, 139 Misc. 2d at 726, 528 N.Y.S.2d at 771. The anniversary of t_4 is relevant because the bankruptcy lasted one year between t_3 and t_4 . *JC* was eligible for one year's worth of tolling. Where, however, no injunction existed during the life of a lien, a motion after the ten-year outward limit comes too late to extend the lien. See *Brookhaven Mem'l Hosp., Inc. v. Hoppe*, 65 Misc. 2d 1000, 319 N.Y.S.2d 564, 566 (Sup. Ct. Suffolk County 1971).

⁷⁵ See N.Y. C.P.L.R. 5203(b) (McKinney 2008).

⁷⁶ See *Barer*, 2001 N.Y. Misc. LEXIS 519, at *5; see also *Place v. Albenese*, 73 Misc. 2d 638, 639, 342 N.Y.S.2d 699, 701 (Sup. Ct. Fulton County 1973) (denying the right to extend *nunc pro tunc*), *aff'd*, 43 A.D.2d 817, 350 N.Y.S.2d 1014 (3d Dep't 1973). The *Barer* decision, allowing for *nunc pro tunc* extensions after the lien is dead, resembles a line of cases holding that, under pre-judgment attachment and post-judgment executions, a creditor can revive a levy *nunc pro tunc* even after the levy has lapsed. See *Barer*, 2001 N.Y. Misc. LEXIS 519, at *5; see also *Kitson & Kitson v. City of Yonkers*, 10 A.D.3d 21, 26, 778 N.Y.S.2d 503, 507-08 (2d Dep't 2004), *modified*, 40 A.D.3d 758, 835 N.Y.S.2d 670 (2d Dep't 2007).

⁷⁷ 11 U.S.C. § 362(a)(2).

⁷⁸ 11 U.S.C.A. § 546(b)(1) (2006).

continue the perfection" of a lien "to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title" ⁷⁹ These provisions describe section 5203(b) motions to extend a docketing lien. These provisions were added to the Bankruptcy Code in 1994. Even before that, the Second Circuit ruled that the stay was not violated by a motion to extend. According to *Morton v. National Bank (In re Morton)*:⁸⁰

Action by a lienholder under [section] 5203(b) does not result in an enlargement of the lien, nor does it threaten property of the estate which would otherwise be available to general creditors. To the contrary, extension under [section] 5203(b) simply allows the holder of a valid lien to maintain the status quo—a policy not adverse to bankruptcy law, but rather in complete harmony with it.⁸¹

The *Morton* court went on to hold that, even where *JC* makes no section 5203(b) motion to extend, the lien is extended by operation of Bankruptcy Code section 108(c),⁸² which provides:

[I]f applicable nonbankruptcy law . . . fixes a period for commencing or continuing a civil action in a court other than a bankruptcy on a claim against the debtor . . . and such period has not expired before the date of the filing of the petition, then such period does not expire until the later of—

- (1) the end of such period, including any suspension of such period occurring on or after the commencement of the case; or
- (2) 30 days after notice of the termination or expiration of the stay under section 362 . . . with respect to such claim.⁸³

Under this provision, the docketing lien cannot die during a bankruptcy proceeding.⁸⁴ *JC* always has thirty days of lien life after the automatic stay is finally terminated.⁸⁵ If *JC* serves an execution on the sheriff and moves to extend the lien under section 5203(b), she can expect to realize on the debtor's real property.

⁷⁹ *Id.* § 362(b)(3).

⁸⁰ 866 F.2d 561 (2d Cir. 1989).

⁸¹ *Id.* at 564.

⁸² *Id.* at 565–66.

⁸³ 11 U.S.C. § 108(c) (2000 & Supp. V 2005).

⁸⁴ *See id.*

⁸⁵ *Id.*

Assuming that *JC* makes a motion under CPLR 5203(b) in lieu of relying on the section 108(c) extension, the CPLR permits an extension "for a period no longer than the time during which the judgment creditor was stayed."⁸⁶ For example, suppose a bankruptcy proceeding existed for 400 days in the middle years of a docketing lien's life. In the waning days of the lien, it is open for *JC* to obtain an extension for 400 days.

Or, alternatively, suppose bankruptcy occurs nine years, eleven months, and thirty days after the judgment roll is filed. The automatic stay prevents enforcement, but not extension. If *JC* moves to extend before the death of the docketing lien, how long will the extension be? The "time during which the judgment creditor was stayed"⁸⁷ has not yet been finally determined. So how shall the court proceed? One possibility is that the court could award an extension for the total time of the automatic stay, whatever time that may turn out to be. Suppose later we find that the automatic stay lasts for two years. By the time this is determined, *JC* is thirty days into the eleventh month of the eleventh year. So the two-year extension terminates one day after the automatic stay ends, at the end of the twelfth year. *JC* has exactly one day of lien life. Assuming she is paying attention, if she serves the execution on the sheriff on this last day and makes yet another section 5203(b) motion, she can still accomplish the execution sale. On this example, the thirty-day extension of Bankruptcy Code section 108(c) is a blessing indeed.⁸⁸

In the *Morton* case, a state court granted *JC*'s section 5203(b) motion by extending the docketing lien for the duration of the bankruptcy proceeding, "plus three months after lifting of [the automatic] stay."⁸⁹ The *Morton* court did not rule on the propriety of this order. But no doubt it is permitted by the wildcard CPLR 5240, which refers to a court's discretion to "extending . . . any enforcement procedure."⁹⁰ If so, we would have an example of section 5240 being used to help *JC*, for a

⁸⁶ N.Y. C.P.L.R. 5203(b) (McKinney 2008).

⁸⁷ *Id.*

⁸⁸ See *infra* text accompanying notes 123–134 (noting that a quite separate extension technique is the action on the judgment brought a year before the docketing lien dies).

⁸⁹ *Morton v. Nat'l Bank (In re Morton)*, 866 F.2d 561, 562 (2d Cir. 1989) (emphasis omitted).

⁹⁰ N.Y. C.P.L.R. 5240.

change. As we shall see, overwhelmingly it is *JDs* who have obtained relief under section 5240.

iv. Proper Parties

Section 5203(b) has the flaw of requiring service only on *JD*.⁹¹ Yet, where *JD* has quitclaimed her equity to *X*, should not *X* be the one served? In *G. Roma Roofing Co. v. Marcotrigiano*,⁹² *X* was indeed served. *X* protested the extension of the lien by pointing out that only *JD* who once owned the property, not *JD*'s co-defendants, were served with notice.⁹³ All the codebtors should have been served, *X* argued.⁹⁴ The court disagreed and held that the docketing lien could be extended so long as *JD* who once owned the property and *X* were joined, though, literally, the statute did not even require the joining of *X*.⁹⁵ Indeed, if the *Morton* case is correct that extending liens is not a taking of debtor property, it is possible to say that *X* has no due process right to be notified, as no property of *X* is being taken. For that matter, section 5203(b) might omit service of *any* party; extension might constitutionally be accomplished in an *ex parte* procedure.

v. Death of the Judgment Debtor

Another event that extends the life of the docketing lien, ironically, is the death of *JD*. According to CPLR 5208, "[a] judgment lien existing against real property at the time of a judgment debtor's death shall expire two years thereafter or ten years after filing of the judgment-roll, whichever is later."⁹⁶ In a probate proceeding, the docketing lien guarantees that *JC* will have a priority as to the encumbered asset over any unsecured creditor.⁹⁷ Execution, however, is not permitted, except by leave

⁹¹ N.Y. C.P.L.R. 5203(b).

⁹² 156 A.D.2d 638, 639, 549 N.Y.S.2d 137, 138 (2d Dep't 1989).

⁹³ *Id.* at 639, 549 N.Y.S.2d at 137.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ N.Y. C.P.L.R. 5208. Where the judgment debtor has conveyed away all interest in the real property subject to his lien and prior to his death, section 5208 has no application. See *Sylmar Holding Corp. v. Steinberg*, 93 Misc. 2d 835, 836, 403 N.Y.S.2d 637, 638 (Sup. Ct. Queens County 1978).

⁹⁷ See *Estate of Pierce*, 122 Misc. 2d 908, 912 472 N.Y.S.2d 275, 278 (Sur. Ct. Onondaga County 1984), *aff'd*, 106 A.D.2d 892, 483 N.Y.S.2d 500 (4th Dep't 1984).

of the surrogate court.⁹⁸ On the other hand, where the execution has issued to a sheriff under a docketing lien on real property, and where death intervenes between the execution and the sale, the sheriff may apparently proceed without leave of the probate court.⁹⁹ This is true even though section 5208 prohibits "any . . . enforcement procedure [to] be undertaken" without the surrogate's permission.¹⁰⁰

2. The Levying Lien

The alternative to the docketing lien is the levying lien. According to CPLR 5235:

After the expiration of ten years after the filing of the judgment-roll, the sheriff shall levy upon any interest of the judgment debtor in real property, pursuant to an execution . . . by filing with the clerk of the county in which the property is located a notice of levy describing the judgment, the execution and the property.¹⁰¹

The key language here is: "[a]fter the expiration of ten years after the filing of the judgment-roll."¹⁰² This language ties into the duration of the docketing lien, which lasts ten years after the judgment-roll is filed. Therefore it is impossible for a creditor to get a levying lien during the time a docketing lien is available. In other words, docketing liens preempt levying liens until the docketing lien has died. Is there any reason for such a rule? By no means! The rule is arbitrary and unworthy of the great state of New York. It should be possible for the sheriff to levy at *any* time as an alternative to docketing a judgment.

⁹⁸ N.Y. C.P.L.R. 5208. Where the creditor already has a valid docketing lien, the creditor need not file a proper claim against the decedent's estate in order to obtain permission to execute. See *In re Chester Nat'l Bank*, 72 Misc. 2d 310, 312, 339 N.Y.S.2d 174, 175 (Sur. Ct. Orange County 1972). The rule in section 5208 does not seem to restrain federal courts. See *Kashi v. Gratsos*, 712 F. Supp. 23, 25 (S.D.N.Y. 1989). But in real estate cases, *JC* must docket in state court and enforce the judgment via the sheriff, in which case section 5208 would apply after all. N.Y. C.P.L.R. 5208.

⁹⁹ *Oysterman's Bank & Trust Co. v. Weeks*, 35 A.D.2d 580, 580, 313 N.Y.S.2d 535, 537 (2d Dep't 1970).

¹⁰⁰ N.Y. C.P.L.R. 5208; see also *Oysterman's Bank*, 35 A.D.2d at 581, 313 N.Y.S.2d at 537 (Benjamin, J., dissenting).

¹⁰¹ N.Y. C.P.L.R. 5235.

¹⁰² *Id.*

In *Community Capital Corp. v. Lee*,¹⁰³ *JC*'s docketing lien was in its final weeks of life's fitful fever and was scheduled to yield the ghost before the execution sale. *JC* did not move to extend under CPLR 5203(b). Instead, the sheriff filed notice of levy *before* the expiration of ten years after the filing of the judgment-roll. The sheriff then conducted an execution sale where *JC* was the buyer. The *Lee* court held that the levy was invalid because it did not occur more than ten years after the judgment-roll was filed.¹⁰⁴ Accordingly, the sale was invalid because no lien existed at the time of the sale.¹⁰⁵ The *Lee* court, however, failed to attend to the precise wording of CPLR 5236(a), which states:

[T]he interest of the judgment debtor in real property which has been levied upon under an execution delivered to the sheriff or which was *subject to the lien of the judgment at the time of such delivery* shall be sold by the sheriff pursuant to the execution at public auction¹⁰⁶

Properly, the sale should have been sustained. *JC* had a docketing lien at the time the execution was delivered. That is all section 5236(a) requires.

Just as the docketing lien has a duration, so has the levying lien. According to the preamble to CPLR 5203(a), the lien commences upon the levy, but it lasts only "until the execution is returned."¹⁰⁷

According to CPLR 5230(c):

An execution shall be returned to the clerk of the court . . . within sixty days after issuance unless the execution has been served in accordance with . . . subdivision (a) of section 5232. The time may be extended in writing for a period of not

¹⁰³ 58 Misc. 2d 34, 294 N.Y.S.2d 336 (Sup. Ct. Nassau County 1968).

¹⁰⁴ *Id.* at 36, 294 N.Y.S.2d at 338; *accord* *Gratton v. Dido Realty Co.*, 139 Misc. 2d 724, 726, 528 N.Y.S.2d 769, 771 (Sup. Ct. Queens County 1988) ("CPLR 5235 does not revive or extend the judicial realty lien itself but allows the judgment to become a levy or 'temporary lien' entirely independent of the realty lien . . .").

¹⁰⁵ The Weinstein-Korn-Miller treatise remarks, "In [*Lee*] the judgment creditor had, for a bid of \$197.25, acquired the judgment debtor's equity which was worth \$13,000. Consequently, that ruling might be closely confined to its facts." JACK B. WEINSTEIN ET AL., NEW YORK CIVIL PRACTICE: C.P.L.R. ¶ 5203.06 (2d ed. 2004). That *JC* had a bargain seems rather unrelated to the question whether the sheriff had properly levied. If the bidding had been spirited, would the levy have been authorized? Only a legal realist would say so.

¹⁰⁶ N.Y. C.P.L.R. 5236(a) (emphasis added).

¹⁰⁷ *Id.* 5203.

more than sixty additional days by the attorney for the judgment creditor Further like extensions may be given by the attorney for the judgment creditor . . . unless another execution against the same judgment debtor . . . has been delivered to the same enforcement officer and has not been returned.¹⁰⁸

This provision makes it clear that the life of the execution (and hence the life of the levying lien) can be extended by the attorney. But the reference to CPLR 5232(a) is illuminating. Section 5232(a) describes the levy of *personal* property not capable of delivery. So the law of personal property is that a levy obviates the need to return the execution.¹⁰⁹ If this is so for personal property, why should the rule be different if the sheriff levies real property? In truth, the different rules for duration of the levying lien and the execution lien on personal property cannot be explained or defended. On this matter the CPLR is quite absurd.

3. Duration of a Money Judgment

The complex interrelation of the docketing lien and the levying lien is partly explained by the duration of the money judgment itself. According to CPLR 211(b):

A money judgment is presumed to be paid and satisfied after the expiration of twenty years from the time when the party recovering it was first entitled to enforce it. This presumption is conclusive, except as against a person who within the twenty years acknowledges an indebtedness, or makes a payment, of all or part of the amount recovered by the judgment, or his heir or personal representative, or a person whom he otherwise represents.¹¹⁰

This period is not a true statute of limitations, but is merely a presumption, though eventually a conclusive one.¹¹¹ For this reason, tolling doctrines and waiver would not apply to it.¹¹² In addition, the period for enforcing a judgment may exceed twenty years where an earlier partial payment or acknowledgement of

¹⁰⁸ *Id.* 5230(c).

¹⁰⁹ No rule is supplied if the sheriff levies property *capable* of delivery.

¹¹⁰ N.Y. C.P.L.R. 211(b).

¹¹¹ See *Jimenez v. Shippy Realty Corp.*, 163 Misc. 2d 121, 125, 618 N.Y.S.2d 963, 966 (Sup. Ct. Westchester County 1994).

¹¹² See *Palazzo v. Hyde*, 82 Misc. 2d 765, 766, 370 N.Y.S.2d 40, 41 (Sup. Ct. Oneida County 1975).

the debt exists. After twenty years, however, *JC* will have to prove that the judgment remains unpaid and that *JD* acknowledged the debtor made a partial payment.¹¹³

The judgment, then, remains viable even after the docketing lien dies. During this post-lien period, executions can issue, so long as the twenty-year period has not run.¹¹⁴ And it is during this period that a levying lien can be created.¹¹⁵ Separately, an action on the judgment can be brought after the docketing lien is dead, but before the twenty-year period has lapsed.¹¹⁶ In such an action a new docketing lien arises, and separately, a new judgment lasting at least twenty years also arises.¹¹⁷

In general, the action on a judgment can be brought only after "ten years have elapsed since the first docketing of the judgment."¹¹⁸ But earlier actions are possible. If *JC* has a

¹¹³ Federal judgments, in contrast, have no statute of limitations and are perpetually valid. See *United States v. Hannon*, 728 F.2d 142, 145 (2d Cir. 1984). Other states have the concept of dormancy. Under this doctrine, a judgment no longer implies a lien on local real estate if the judgment becomes dormant. In Ohio, the real estate lien arises when a certificate of judgment is filed with the court of common pleas where the real estate is located. See OHIO REV. CODE ANN. § 2329.02 (LexisNexis 2008). Dormancy occurs if no writ of execution or new certificate of judgment is filed within five years of entry. See *id.* § 2329.07. Typically, actions on the judgment can revive the judgments, but must be brought within a specified time after dormancy begins. See *id.* § 2325.18 (limiting Ohio to revive a judgment within ten years).

¹¹⁴ See *Paola Vista Clothing, Ltd. v. V.R.P. Calzaturificio S.P.A.*, 148 A.D.2d 593, 595, 539 N.Y.S.2d 59, 60 (2d Dep't 1989). Prior to enactment of the CPLR, an execution could issue five years after entry only with permission of the court. See *Levine v. Bornstein*, 4 N.Y.2d 241, 244, 149 N.E.2d 883, 885, 173 N.Y.S.2d 599, 601 (1958).

¹¹⁵ See *Quarant v. Ferrara*, 111 Misc. 2d 1042, 1044, 445 N.Y.S.2d 885, 887 (Sup. Ct. Queens County 1981).

¹¹⁶ N.Y. C.P.L.R. 5014 (McKinney 2008).

¹¹⁷ See *First Nat'l Bank of Long Island v. Brooks*, No. 10130/03, 2003 WL 23009241, at *2 (Dist. Ct. Nassau County Sept. 22, 2003).

¹¹⁸ N.Y. C.P.L.R. 5014(1). This point was overlooked in *Acquisitions Plus, LLC v. Krupski*, 16 A.D.3d 827, 828, 792 N.Y.S.2d 635, 636 (3d Dep't 2005), where *JC* obtained a judgment for conversion in May 1993. *JD* promptly filed for bankruptcy, and *JC* obtained a judgment from the bankruptcy court that the conversion judgment was nondischargeable. *JC* filed this judgment with the clerk of the Supreme Court on July 8, 1994. The appellate division ruled that the anti-discharge judgment, when filed with the state court, gave rise to a new docketing lien. Everything about this holding is odd. First, a judicial ruling that a prior claim against *JD* is not discharged may be a judgment obtained in an adversary proceeding, FED. R. BANKR. P. 7001(5), but it is hardly a money judgment. There should have been no lien associated with it. See generally Alan M. Ahart, *Enforcing Nondischargeable Money Judgments: The Bankruptcy Courts' Dubious Jurisdiction*, 74 AM. BANKR. L.J. 115 (2000) (bankruptcy courts have no jurisdiction to issue

default judgment in which *JD* never appeared and where *JD* was not personally served with process, *JC* can commence an early action on the judgment, presumably to improve the dubious worth of default judgments, which fail if service of process was defective. Also, an earlier action may be brought if the court "so orders on motion with such notice to such other persons as the court may direct."¹¹⁹ This motion, however, is not the same as bringing the action itself. The action on a judgment must be commenced like any other action. A "motion" is therefore an inappropriate procedure for generating a new *judgment*.¹²⁰

Apparently, it is also possible to use the action on the judgment to *extend* the old docketing lien. The extension function requires commencement of the action prior to the ninth and before the end of the tenth year after the judgment-roll is filed. This possibility stems from a triad of sentences added to CPLR 5014 in 1986:¹²¹

money judgments in conjunction with anti-discharge rulings). Second, if this judgment gave rise to a lien, it must be viewed as an action on the earlier judgment, since it makes reference to it and gives rise to a lien. Yet, actions on a judgment are not permitted within ten years. Third, we are not told precisely when the discharge judgment was filed, but it seems very possible that the judgment was filed with the state clerk during the pendency of the automatic stay. Actions in violation of the automatic stay are usually thought to be void or voidable. *See City of Farmers Branch v. Pointer (In re Pointer)*, 952 F.2d 82, 85–86 (5th Cir. 1992) (discussing when actions are considered voidable); *Lincoln Sav. Bank v. Suffolk County Treasurer (In re Parr Meadows Racing Ass'n)*, 880 F.2d 1540, 1545 (2d Cir. 1989) (discussing when actions are considered void). This perhaps was another reason why the bankruptcy judgment should not have given rise to a lien.

In *Krupski*, the supreme court had issued a CPLR 5240 protective order against execution of any sort. 16 A.D. 3d at 828, 792 N.Y.S.2d at 636. This meant that, so long as *JC* moved before the death of the discharge judgment lien, it could extend the life of the lien past the usual ten years. *See supra* text accompanying notes 70–99. The Supreme Court, however, had issued the section 5240 protection order on June 29, 2004. The dubious discharge lien was scheduled to die on July 8, 2004. Therefore, *JC* had less than two weeks to make its CPLR 5203(b) motion.

¹¹⁹ N.Y. C.P.L.R. 5014(3).

¹²⁰ *See Curia v. Brooks, Weinger, Robbins & Leeds, Inc.*, 182 Misc. 2d 36, 38–39, 696 N.Y.S.2d 776, 778–79 (N.Y. Civ. Ct. Bronx County 1999). The *Curia* court rejects, as contrary to the statute, a suggestion by Professor Siegel that local *JCs* should have access to the easy procedure of article 54, pertaining to the recognition of foreign judgments. *See id.* at 40, 696 N.Y.S.2d at 779.

¹²¹ Ch. 123, § 1, 1986 N.Y. Laws 235 (McKinney). In response to this amendment, the New York Office of Court Administration remarked, "Since this measure is not likely to have a significant impact on court administration, the Office . . . takes no position on the measure." Memorandum of Office of Court Administration, *reprinted in* Ch. 123, 1986 N.Y. Laws 3379 (McKinney). It then made the excellent suggestion that the docketing lien be made coterminous with the

An action may be commenced under subdivision one of this section during the year prior to the expiration of ten years since the first docketing of the judgment. The judgment in such action shall be designated a renewal judgment and shall be so docketed by the clerk. *The lien of a renewal judgment shall take effect upon the expiration of ten years from the first docketing of the original judgment.*¹²²

Courts have read the emphasized language to *extend* the old lien, not to create a *new* lien. Presumably, the period of extension is ten years after the judgment roll is filed in the *new* action. Such a reading makes sense. If it were read as creating a new lien, then any transferee of *JD* during the life of the old lien would obtain a complete promotion at the end of the first docketing lien. Where *JD* has sold equity outright to *X* subject to *JC*'s lien, for example, *JC*'s renewal lien would have nothing to which it could attach, and *X* would have obtained a windfall. There would be little to recommend such a result. Analogously, article 9 of the Uniform Commercial Code ("UCC") has an express "continuous perfection" principle. In its current version, the principle is expressed as follows:

A security interest . . . is perfected continuously if it is originally perfected by one method under this article and is later perfected by another method under this article, without an intermediate period when it was unperfected.¹²³

In contrast, CPLR 5014 does not invoke the word "continuous." Nevertheless, courts have sensibly found continuity to be the theme of the renewal judgment.

Thus, in *Matis v. Delasho*,¹²⁴ a docketing lien existed prior to *JD*'s bankruptcy. In the bankruptcy *JD* was discharged. A discharge "voids any judgment at any time obtained, to the extent that such judgment is a determination of the *personal liability* of the debtor with respect to any debt discharged under section 727."¹²⁵ The prepetition judgment of *JC* was therefore voided, but the docketing lien was not.¹²⁶ And *JC* could extend

life of the judgment itself, eliminating an excuse for confusion in the period after the docketing lien yields the ghost.

¹²² Ch. 123, § 1, 1986 N.Y. Laws 235 (McKinney) (emphasis added).

¹²³ U.C.C. § 9-308(c) (2005).

¹²⁴ 191 Misc. 2d 338, 741 N.Y.S.2d 849 (Sup. Ct. Westchester County 2002).

¹²⁵ 11 U.S.C. § 524(a)(1) (2000) (emphasis added).

¹²⁶ *Mathis*, 191 Misc. 2d at 339, 741 N.Y.S.2d at 850; see also *Brooklyn Jenapo Fed. Credit Union v. Shain (In re Shain)*, 47 B.R. 309, 313 (Bankr. E.D.N.Y. 1985);

this lien by bringing an action on the judgment prior to the lapse of the docketing lien.¹²⁷ Had *JC* waited until after the docketing lien was dead, the discharge would have prevented any "new" lien from arising.¹²⁸ Discharge cannot, however, prevent extending the life of the old lien.

In *In re Buchardt*,¹²⁹ the extending nature of the action on the judgment was cleverly used to dodge the effect of Bankruptcy Code section 522(f)(1).¹³⁰ This section permits the avoidance of judicial liens to the extent they impair exemptions.¹³¹ The main effect of section 522(f)(1) is to prevent judicial liens from enjoying appreciation value from the real estate after bankruptcy, to the extent of the exemption. For instance, New York's real estate exemption is limited in value to \$50,000.¹³² Suppose *JD*'s homestead is over-encumbered with mortgages. In bankruptcy, *JD* can use section 522(f)(1) to ensure that, after bankruptcy, if the homestead appreciates in value to \$50,000 or more over the mortgages, *JD* will be the recipient of the appreciation value.

Section 522(f)(1) was a new idea introduced to bankruptcy law in 1978.¹³³ The provision had no effect on liens in existence prior to 1978.¹³⁴ In *Buchardt*, *JC* had a judgment docketed on September 16, 1977.¹³⁵ In July 1987, *JC* brought a timely action on the judgment.¹³⁶ The extending effect of the action meant that *JD* could not bring a section 522(f) avoidance action against the lien, as the lien antedated, by grace of the extension, the enactment of section 522(f).¹³⁷

Carman v. European Am. Bank & Trust Co., 78 N.Y.2d 1066, 1067, 581 N.E.2d 1345, 1347, 576 N.Y.S.2d 90, 92 (1991). According to section 150(4)(b) of the New York Debtor and Creditor Law, a debtor with a discharge is entitled only to have a qualified discharge marked on the docket, indicating that the judgment creditor may have a surviving lien on the property. N.Y. DEBT. & CREDIT. LAW § 150(4)(b) (McKinney 2008).

¹²⁷ N.Y. C.P.L.R. 5014 (McKinney 2008).

¹²⁸ See *Gratton v. Dido Realty Co.*, 139 Misc. 2d 724, 726, 528 N.Y.S.2d 769, 771 (Sup. Ct. Queens County 1988).

¹²⁹ 114 B.R. 362 (Bankr. N.D.N.Y. 1990).

¹³⁰ 11 U.S.C. § 522(f)(1) (2000 & Supp. V 2005).

¹³¹ *Id.*

¹³² See *infra* note 464 and accompanying text.

¹³³ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 522(f)(1), 92 Stat. 2549, 2589 (1978).

¹³⁴ *United States v. Sec. Indus. Bank*, 459 U.S. 70, 81 (1982).

¹³⁵ *In re Buchardt*, 114 B.R. 362, 363 (Bankr. N.D.N.Y. 1990).

¹³⁶ *Id.*

¹³⁷ *Id.* at 365. The question may arise: Isn't the homestead exemption self-executing? Why does a bankrupt debtor need section 522(f)(1) to protect the

Buchardt contained a hidden issue. Although *JC* commenced the section 5014 action before its old lien died, the court did not actually rule in favor of *JC* until two days *after* the death of the lien.¹³⁸ Nevertheless, the *Buchardt* court ruled that *JC* had a continuous lien back to 1977.¹³⁹

What if, after the old lien had died and before the actual extension had been granted, *JD* grants a mortgage to *A*? The docket will not reflect the fact that *JC* is in the process of extending the lien. Is *A* entitled to priority over *JC*?

The court in *Gletzer v. Harris*¹⁴⁰ read section 5014 as requiring not only commencement, but *completion* of the action before the death of the old lien. In *Gletzer*, *JC*'s docketing lien was due to expire on October 24, 2001.¹⁴¹ Therefore, on October 22, 2001, *JC* commenced his section 5014 action.¹⁴² The supreme court did not get around to granting *JD* summary judgment until June 26, 2007.¹⁴³ Meanwhile, in 2003, *JD* granted mortgages to *A* and *B*.¹⁴⁴ According to the appellate panel, *JC* had to commence *and prevail* before the original docketing lien died, in order to prevail against "gap" transferees:

Here, [*A* and *B*] demonstrated that they properly recorded mortgages establishing liens against [*JD*'s] condominium unit at a time when the official records indicated that the only extant lien had expired by October 23, 2001. Once the county docket book reflected only [*JC*'s] expired lien, other creditors were fully entitled to rely upon that fact and make mortgage loans on the assumption that their mortgage liens would have priority. They had no obligation to take into account the possibility that [*JC*] might, in the future, successfully obtain a new lien against [*JD*'s] property.¹⁴⁵

exemption? While the homestead is *usually* self-executing, there is one circumstance where it is not, rendering section 522(f)(1) crucial to the debtor's exemption.

¹³⁸ *Buchardt*, 114 B.R. at 363. In contrast, *JC*, in *Matis v. Delasho*, obtained relief six days before the original docketing lien died. 191 Misc. 2d 338, 339, 741 N.Y.S.2d 849, 849 (Sup. Ct. Westchester County 2002).

¹³⁹ *Buchardt*, 114 B.R. at 365.

¹⁴⁰ 51 A.D.3d 196, 200, 854 N.Y.S.2d 10, 13 (1st Dep't 2008).

¹⁴¹ *Id.* at 202, 854 N.Y.S.2d at 15.

¹⁴² *Id.* at 198, 854 N.Y.S.2d at 12.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 199, 854 N.Y.S.2d at 13.

The *Gletzer* court also hinted that if *A* and *B* had knowledge of *JC*'s renewal action, *JC* might have prevailed.¹⁴⁶ So a fuller version of the *Gletzer* rule might be as follows: After docketing, *JC* has a lien on local real property until ten years after the judgment roll is filed.¹⁴⁷ If *JC* files an action on the judgment in the one-year period prior to the lapse of the docketing lien, *JC* obtains an *equitable lien* on *JD*'s property, if the court has not granted the new judgment. The source of this equitable lien is the final sentence in section 5014, which provides: "The lien of a renewal judgment shall take effect upon the expiration of ten years from the first docketing of the original judgment."¹⁴⁸ Once the court grants the new judgment, the equitable lien becomes a judicial lien. This vision coheres with *Buchardt*, which found continuity of a lien even though a gap existed between the old lien and the docketing of the new judgment.¹⁴⁹ It also prevents transferees who were subject to *JC*'s original lien from enjoying a promotion in priority just because of judicial delay in granting the new judgment. It protects *A* and *B* if and only if they are bona fide purchasers for value.¹⁵⁰ It does not protect a *JC*₂ who docketes in the equitable gap; *JCs* are typically subordinated to prior equitable liens,¹⁵¹ though New York has some unfortunate case law to the contrary.¹⁵² And finally, *JC* can protect himself in

¹⁴⁶ *Id.* at 203, 854 N.Y.S.2d at 15.

¹⁴⁷ N.Y. C.P.L.R. 5203(a) (McKinney 2008).

¹⁴⁸ *Id.* 5014.

¹⁴⁹ *In re Buchardt*, 114 B.R. 362, 364–65 (Bankr. N.D.N.Y. 1990).

¹⁵⁰ *See* *Reif v. Equitable Life Assurance Soc'y*, 268 N.Y. 269, 276, 197 N.E. 278, 280 (1935) (citing *Ward v. City Trust Co.*, 192 N.Y. 61, 74, 84 N.E. 585, 589 (1908)).

¹⁵¹ *Eisenberg v. Mercer Hicks Corp.*, 199 Misc. 52, 54, 101 N.Y.S.2d 662, 664 (Sup. Ct. N.Y. County 1950), *aff'd mem.*, 278 A.D.2d 806, 104 N.Y.S.2d 804 (1st Dep't 1951).

¹⁵² *In City of New York v. Bedford Bar & Grill, Inc.*, *JD* assigned to *SP* its contingent right to a refund from the state comptroller if *JD* chose to cancel its liquor license. 2 N.Y.2d 429, 431, 141 N.E.2d 575, 575, 161 N.Y.S.2d 67, 68 (1957). *JD* did cancel its license, so that the comptroller had a fixed obligation to pay. *Id.* at 432, 141 N.E.2d at 575, 161 N.Y.S.2d at 68. *JC* then obtained a lien on the comptroller's obligation. *Id.* The Court of Appeals held that *JC* was the victor. *Id.* at 432, 141 N.E.2d at 576, 161 N.Y.S.2d at 68. *SP* had only an equitable lien on after-acquired property, which could not take priority over *JC*'s "legal" judicial lien. *Id.* at 432–33, 141 N.E.2d at 576, 161 N.Y.S.2d at 69. One would have thought that the equitable lien, arising when the comptroller's obligation to pay became vested, would have been completely good against a subsequent judicial lien. *See id.* at 434–35, 141 N.E.2d at 577, 161 N.Y.S.2d at 70 (Froessel, J., dissenting). The whole point of the equitable lien is to foreclose subsequent creditors. Nevertheless, *JC* prevailed, justly

the gap during which the equitable lien exists by filing a notice of pendency.¹⁵³ This solution puts some extra procedural burden on *JC*, but the notice of pendency makes sure that gap transferees cannot claim to take free of *JC*'s renewal judgment.

III. THE SALE

A. *The Requirement of a Lien*

A lien is a power of sale—a power that is the key to the entire process of liquidating real property in aid of money judgment satisfaction.¹⁵⁴ According to CPLR 5236(a): “[T]he interest of the judgment debtor in real property which has been levied upon under an execution delivered to the sheriff or which was subject to the lien of the judgment at the time of such delivery shall be sold by the sheriff pursuant to the execution”¹⁵⁵ Here are set forth two conditions precedent to the sheriff's sale. First, *JC* must have delivered an execution to the sheriff. With regard to the execution, it is a rule that the sheriff will do nothing with regard to a money judgment unless an execution shall have been delivered to her.¹⁵⁶ But the execution itself does not create a lien on real property. Only docketing or levying does so.

Second, there must have been a levy or a “lien of the judgment” at the time the execution was served. We must presume that “lien of the judgment” means a docketing lien.¹⁵⁷

engendering the scorn of the great Grant Gilmore. 1 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* §§ 7.12, 12.9 (1999).

¹⁵³ According to CPLR 6501,

[a] notice of pendency may be filed in any action in a court of the state or of the United States in which the judgment demanded would affect the title to . . . real property. The pendency . . . is constructive notice, from the time of filing of the notice only, to a purchaser from, or incumbrancer against, any defendant named in a notice of pendency indexed in a block index against a block in which property affected is situated or any defendant against whose name a notice of pendency is indexed.

N.Y. C.P.L.R. 6501 (McKinney 2008).

¹⁵⁴ See *supra* Part II.A.1.

¹⁵⁵ N.Y. C.P.L.R. 5236(a).

¹⁵⁶ See *Ansonia Brass & Copper Co. v. Conner*, 103 N.Y. 502, 510, 9 N.E. 238, 239 (1886).

¹⁵⁷ Section 5236(a) arguably implies that if, after docketing, the judgment debtor has sold the equity in the property, the sheriff should not sell. The sheriff, however, can be compelled to sell in spite of this implication. See *Jones v. Knowlton*, 199 A.D.2d 871, 872, 606 N.Y.S.2d 355, 356 (3d Dep't 1993).

Under CPLR 5203(a), only levying and local docketing with the county clerk give rise to liens. Entry of judgment does not.

B. Procedural Details

The CPLR much regulates the sale. First, the sale must be scheduled between the 56th and 63rd day after publication of notice of the sale.¹⁵⁸ The sheriff, however, may postpone it.¹⁵⁹ The sale must be by auction, and "at such time and place within the county where the real property is situated . . . as in [the sheriff's] judgment will bring the highest price."¹⁶⁰ Neither the sheriff nor his deputy may buy at the auction.¹⁶¹ The sheriff may sell such combination of parcels as will bring the highest price.¹⁶²

Notice of the sale must be served on *JD*¹⁶³ and posted in three public places where the land is located.¹⁶⁴ Notice must also be published once every two weeks in a newspaper published in the county (or an adjoining county, if none).¹⁶⁵ Significantly, the sheriff must mail notice to all parties holding an interest the real property to be sold.¹⁶⁶

What are the consequences of procedural mistakes? The CPLR states that *purchasers without notice* are not affected by the sheriff's failure to give notice.¹⁶⁷ This, of course, implies that *purchasers with notice* are affected. These matters are considered later, in connection with the questionable constitutionality of CPLR 5236(c).¹⁶⁸

¹⁵⁸ N.Y.C.P.L.R. 5236(a).

¹⁵⁹ *Id.* The public is invited to request from the sheriff notice of any postponement. *Id.* 5236(d). The request, and the sheriff's response, must be made by personal service on the sheriff or by certified or registered mail. *Id.* A postponing sheriff must show up at the scheduled time and place of sale and announce the postponement. *Id.*

¹⁶⁰ *Id.* 5236(a). If real property traverses a county line, the sale may be held in either county. *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* 5236(c); *see also id.* 308.

¹⁶⁴ *Id.* 5236(c).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* ("A list containing the name and address of the judgment debtor and of every judgment creditor whose judgment was a lien on the real property to be sold . . . shall be furnished [sic] the sheriff by the judgment creditor, and each person on the list shall be served by the sheriff with a copy of the notice . . .").

¹⁶⁷ *Id.*

¹⁶⁸ *See infra* text accompanying notes 244-272.

C. Sale of Mortgaged Premises

In New York, the sheriff may not execute on *JD*'s real property if *JC* also holds a mortgage on the same land to which her judicial lien attaches. For example, suppose *JD* granted a mortgage on Blackacre to *A* and then defaults. Instead of foreclosing on the mortgage, *A* elects to obtain a money judgment for the mortgage debt. According to CPLR 5236(b), the sheriff may not sell Blackacre.¹⁶⁹ Of course, it remains open, after the money judgment, for *A* separately to enforce its mortgage,¹⁷⁰ or to execute on other real or personal property of the debtor.

The reason for this restriction is that, under New York mortgage law, *D* has the right to redeem Blackacre by tendering to *A* the amount of the mortgage debt. This "equity of redemption" exists until the foreclosure sale is accomplished.¹⁷¹ But, rather shockingly, the CPLR provides no right of redemption. In general, if *JC* has a docketing lien on *JD*'s property, and if *JD* tenders the amount of the judgment to *JC*, *JC* ostensibly does not have to take it and can proceed maliciously to sell *JD*'s real property. There is no accounting for why this should be so. Fortunately, it is also part of New York law that the courts can do whatever they want, with respect to enforcement of judgments. According to CPLR 5240, "[t]he court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure." Presumably, courts will use this power to force *JC*₁ to take the tender or lose the right of sale.¹⁷²

¹⁶⁹ For this reason, section 5230(a)'s last sentence requires: "Where the judgment . . . was recovered for all or part of a mortgage debt, the execution shall also describe the mortgaged property, specify the book and page where the mortgage is recorded, and direct that no part of the mortgaged property be levied upon or sold thereunder." N.Y. C.P.L.R. 5230(a).

¹⁷⁰ *Goddard v. Johnson*, 96 Misc. 2d 230, 231, 408 N.Y.S.2d 923, 923 (N.Y. Civ. Ct. Kings County 1978). If the creditor has already started a mortgage foreclosure proceeding, the mortgagee may not seek a money judgment without permission from the foreclosing court. See N.Y. REAL PROP. ACTS. LAW § 1301(3) (McKinney 2008). If the mortgagee first obtains a judgment, she may not start a foreclosure sale until the sheriff returns an execution unsatisfied. *Id.* § 1301(1).

¹⁷¹ N.Y. REAL PROP. ACTS. LAW § 1341.

¹⁷² See *Rondack Const. Servs., Inc. v. Kaatsbaan Int'l Dance Ctr., Inc.*, 54 A.D.3d 924, 926, 864 N.Y.S.2d 127, 128–29 (2d Dep't 2008); *Sweeney, Cohn, Stahl & Vaccaro v. Kane*, 33 A.D.3d 785, 787, 822 N.Y.S.2d 632, 633–34 (2d Dep't 2006).

The Court of Appeals seemed to say otherwise in *Guardian Loan Co. v. Early*,¹⁷³ which held that CPLR 5240 could not be used to overturn sales solely on the basis of inadequate bids at the auction.¹⁷⁴ In the course of so ruling, the court said:

Indeed, to permit CPLR 5240 to be used to set aside already completed execution sales would be *tantamount to a judicial resurrection of the concept of equity of redemption* a remedy purposefully deleted from article 52 by the Legislature and one which we have no right to invoke. However unfortunate the judgment debtor's plight may be, CPLR 5240 relates to the use of an enforcement device; it has no application after the threatened use of an enforcement procedure is a *fait accompli*.¹⁷⁵

This passage should not be read to bar use of section 5240 to compel *JC* to take cash in lieu of proceeding with the execution sale. Rather, the *Early* court is referring to pre-CPLR law which permitted judgment debtors to redeem property *after the sale*.¹⁷⁶ What must not be revived is a post-sale redemption period that would have the effect of depressing the bids at execution sales. Pre-sale redemption would have no such effect and is clearly a good (even compelling) idea.

Be that as it may, where *A* holds a mortgage *and* a money judgment, *A* may not cause the sheriff to hold an execution sale, because that would deprive *JD* of the "right of redemption" under mortgage law.¹⁷⁷ If, however, redemption were part of the CPLR scheme, as it should be, then the restriction against selling mortgaged property could be repealed. In fact, where *JC* also has a mortgage on property as to which she has docketed locally, the sheriff could be viewed as foreclosing the mortgage itself. The CPLR could take guidance from article 9 of the UCC. According to section 9-601(e) of the UCC:

(granting redemption right under section 5240), *appeal denied*, 8 N.Y. 858, 863 N.E.2d 109, 831 N.Y.S.2d 105 (2007). If *JD* satisfies the judgment and pays *JC*, *JD* will still owe the sheriff a poundage fee. See N.Y. C.P.L.R. 8012(b)(2). This will be calculated as a percentage of the value of *JD*'s interest in the real property. No deduction in value is permitted if *JD*'s property is entitled to the New York homestead exemption. See *Dean v. Dean*, 174 Misc. 2d 171, 173, 662 N.Y.S.2d 1014, 1016 (Sup. Ct. Tompkins County 1997).

¹⁷³ 47 N.Y.2d 515, 521, 392 N.E.2d 1240, 1244, 419 N.Y.S.2d 56, 60 (1979).

¹⁷⁴ See *infra* text accompanying notes 228-246.

¹⁷⁵ 47 N.Y.2d at 520, 392 N.E.2d at 1243, 419 N.Y.S.2d at 60 (emphasis added).

¹⁷⁶ New York Civil Practice Act, ch. 925, §§ 724-28, 1920 N.Y. Laws 254-55 (repealed 1963).

¹⁷⁷ See N.Y. REAL PROP. ACTS. LAW § 1341.

If a secured party has reduced its claim to judgment, the lien of any levy that may be made upon the collateral by virtue of an execution based upon the judgment relates back to the earliest of:

- (1) the date of perfection of the security interest . . . in the collateral; [or]
- (2) the date of filing a financing statement covering the collateral¹⁷⁸

As this is the law of New York for personal property, there is absolutely no reason why it should not also be the law for real property. In fact, since courts can do whatever they want under CPLR 5240, it is open for them to achieve this result without the need for any legislative intervention.

D. What's for Sale?

1. First in Time Is First in Right

One thing the CPLR omits to explain is what a buyer gets when real property is sold pursuant to section 5236. As the entire debt enforcement regime turns on the answer to this question, the omission is rather negligent. All we learn from the CPLR is that the "sheriff shall execute and deliver to the purchaser . . . a deed which shall convey the right, title and interest sold."¹⁷⁹ But what interest is that?

To answer the question, we must refer back to the nonstatutory formula for liens developed earlier¹⁸⁰. The sheriff may sell whatever *JD* could have sold at the time *JC*'s lien was created.¹⁸¹ Liens are created by docketing or levy. So the inquiry becomes, "What did the debtor have at the time of lien creation?" *That*, at least, is what the sheriff can sell.¹⁸²

¹⁷⁸ U.C.C. § 9-601(e) (2005).

¹⁷⁹ N.Y. C.P.L.R. 5236(f) (McKinney 2008). The sheriff must also prove publication, service of notice and posting of notice. *Id.*

¹⁸⁰ See *supra* Part II.A.

¹⁸¹ See *May v. Finnerty*, 104 Misc. 2d 450, 452, 428 N.Y.S.2d 570, 571 (Sup. Ct. Suffolk County 1980) ("A purchaser, after he obtains the Sheriff's deed is in the same position as he would have been if the deed had been executed by the judgment debtor at the time the judgment was docketed . . ."). I have altered the foregoing description to make clear that when *JC* causes the sheriff to sell, *JC*'s lien disappears as well as any interest that comes into being after *JC*'s judgment was docketed.

¹⁸² Courts have difficulty articulating this principle. In *Guardian Loan Co. v. Early*, the court said, "the purchaser at a Sheriff's sale now takes immediate title to

The CPLR conforms with this model, but only in part. In *Insulation Plus, Inc. v. Higgins*,¹⁸³ we had the following scenario:

*t*₁: *JC*₁ docketed against *JD*.

*t*₂: Pursuant to *JC*₁'s execution, the sheriff sells *JD*'s real property. The buyer is *JC*₁ for the princely sum of one dollar.¹⁸⁴ The sheriff does not, however, write out a deed to *JC*₁.

*t*₃: *JC*₂ docketed.

In *Insulation Plus*, *JC*₁ successfully obtained a declaration that *JC*₂ was foreclosed.¹⁸⁵ This is because *JC*₁ could sell whatever the debtor had at *t*₁, when *JC*₁'s lien was created.¹⁸⁶ The *Insulation Plus* court articulated the principle of "first in time is first in right" as follows:

Once the deed was recorded, title was deemed to have passed *at the time plaintiff's judgment was docketed*. "[T]he purchaser at a Sheriff's sale . . . takes immediate title to the property and is placed in the same position as he would have been if the deed had been executed by the judgment debtor himself"¹⁸⁷

To give another example, in *Department of Housing Preservation & Development v. Ferranti*,¹⁸⁸ the following chronology unfolded:

*t*₁: *JC* docketed against *JD*.

*t*₂: *JD* sells the equity to *B*.

*t*₃: *B* grants a mortgage to *C*.

*t*₄: After *B* defaults, *C* arranges a foreclosure sale, where *C* is the buyer.

the property and is placed in the same position as he would have been if the deed had been executed by the judgment debtor himself." 47 N.Y.2d 515, 518, 392 N.E.2d 1240, 1242, 419 N.Y.S.2d 56, 58-59 (1979). This does not work if the debtor has conveyed away the property by the time of the execution sale. The court should have said that the purchaser takes title as if the deed had been executed by the judgment debtor *at the time of lien creation*.

¹⁸³ 214 A.D.2d 1001, 626 N.Y.S.2d 609 (4th Dep't 1995).

¹⁸⁴ How could *JC*₁ win the auction for one dollar? One strong possibility is that *JD* had previously granted a mortgage to *A*, and the mortgage was under water—that is, the unencumbered property was worth less than the amount of *A*'s claim.

¹⁸⁵ *Higgins*, 214 A.D.2d at 1002, 626 N.Y.S.2d at 610.

¹⁸⁶ *Id.*, 626 N.Y.S.2d at 610-11 (emphasizing that *JC*₂ succumbed to CPLR 5203(a)(3) in that *JC*₁ was a purchaser who took free and clear of *JC*₂). This is true, but *JC*₁ wins just from the preamble to section 5203(a) without any reference to this exception.

¹⁸⁷ *Id.*, 626 N.Y.S.2d at 611 (emphasis added) (citing *Guardian*, 47 N.Y.2d at 518, 392 N.E.2d at 1242, 419 N.Y.S.2d at 58).

¹⁸⁸ 212 A.D.2d 438, 622 N.Y.S.2d 717 (1st Dep't 1995).

t_5 : JC serves an execution on the sheriff, and the sheriff sells to X .

At t_5 , JC had the power to sell whatever JD had at t_1 —fee simple absolute. JD 's transfer at t_2 could not affect JC 's power. Nor could B 's transfer at t_3 . Notice that at t_5 , JD had no interest at all in the real property. C owned the equity by virtue of buying at t_4 . Yet the sheriff still had the power to sell the real property. At t_3 , C (as buyer) bought whatever B had at t_3 (when C 's mortgage was created). At t_3 , B had an estate encumbered by JC 's lien. Accordingly, C was forecloseable by JC at t_5 .

2. Second in Time Is First in Right

The CPLR follows the rule of "first in time is first in right," but it also has some rules of "second in time is first in right." These are legislated as *exceptions* to the basic "first in time" notion.

a. Judicial Liens Second in Time

According to CPLR 5203(a), liens arise upon local docketing or levy, subject to an important exception.¹⁸⁹ These liens, however, are no good against "a transfer to a purchaser for value at a judicial sale, which shall include an execution sale."¹⁹⁰ The Fifth Scenario illustrates how this rule of "second in time" works.

Fifth Scenario

t_1 : JC_1 docket.

t_2 : JC_2 docket.

t_3 : JC_2 serves an execution, but JC_1 never does.

t_4 : At the execution sale, based on JC_2 's execution, X is the buyer.

Under CPLR 5203(a)(3), JC_2 has the power to foreclose JC_1 , even though JC_2 is second in time. Oddly, section 5203(a) never refers to JC_2 . Rather, it refers to X . So until X comes into the picture at t_4 , JC_1 is not yet expressly subordinated to JC_2 . Section 5203(a)(3), however, implies that X takes free of JC_1 's judicial lien. And this in turn implies that JC_2 has power to sell *more*

¹⁸⁹ N.Y. C.P.L.R. 5203(a).

¹⁹⁰ *Id.* 5203(a)(3). This provision is a change from the prior law, which followed the classic "first-in-time" foreclosure regime. See, e.g., *Bennett v. Fish*, 2 Misc. 2d 1051, 1053, 157 N.Y.S.2d 871, 873 (Sup. Ct. Albany County 1956) (buyer at execution sale junior to senior judicial liens).

than what *D* had at the time *JC*₂'s lien was created. *JC*₂ is second in time but first in right in terms of the power to sell.

b. Purchase Money Mortgages

Another important rule of "second in time is first in right" entails purchase money mortgages. According to CPLR 5203(a)(2), *JC*'s lien is no good against "a transfer in satisfaction of a mortgage given to secure the payment of the purchase price of the judgment debtor's interest in the property."¹⁹¹ The following scenario illustrates the rule:

Sixth Scenario

*t*₁: *JC* docketts a judgment, but *JD* owns no real estate.

*t*₂: *JD* acquires real estate from *V*. *V* delivers a deed to *JD* and *JD* pays *V* with proceeds supplied by *C*, a mortgage lender.

*t*₃: Minutes after *JD* acquires title from *V*, *JD* delivers a mortgage deed to *A*. *A* records this deed.

*t*₄: *JC* serves an execution on the sheriff, who holds a sale, where *Y* is the buyer.

*t*₅: *A* declares a default by *JD* and arranges a foreclosure sale, where *X* is the buyer.

In this scenario, *JC* obtained no lien at *t*₁ for the simple reason that *JD* had no real estate. Only at *t*₂ did *JD* obtain real estate. At this time *JC*'s lien came into existence.¹⁹²

At *t*₃, *A* obtained a lien and therefore was second in time. But *A*'s mortgage lien was "given to secure the payment of the purchase price of [*JD*]'s interest in the property" within the meaning of CPLR 5203(a)(2).¹⁹³ Notice that section 5203(a)(2) never mentions *A* directly. Rather, it awkwardly protects "a transfer in satisfaction" of *A*'s mortgage.¹⁹⁴

X was the buyer at *t*₅, when *A* foreclosed. Did *X* receive "a transfer in satisfaction" of a purchase money mortgage? Not exactly. What satisfied *A*'s mortgage was *X*'s payment of the purchase price, to which *A* had priority. The exception does not expressly work for the benefit of *X*. The exception functions linguistically if *JD* were to make a conveyance to *A* in lieu of foreclosure. In that case, *JD*'s conveyance satisfies the mortgage

¹⁹¹ N.Y. C.P.L.R. 5203(a)(2).

¹⁹² On the after-acquired property aspect of docketing liens, see *infra* text accompanying notes 373-380.

¹⁹³ N.Y. C.P.L.R. 5203(a)(2).

¹⁹⁴ See *id.* 5203(a)(3).

debt. Or, if A outbid *X* at t_5 , A could bid in the purchase money mortgage and take back *JD*'s equity interest. In such a case, A takes a transfer in satisfaction of her mortgage. The statute, however, doesn't seem to describe *X* at all. Nevertheless, it seems pretty clear that the idea is to give a superpriority to purchase money mortgages.¹⁹⁵ And to achieve this, *X* must be able to buy free and clear of *JC*. No court has said otherwise (so far). As is often the case, the language of the CPLR is awkward. Courts must read past the draftsmanship to discern the basic logic of debtor-creditor relations. They are encouraged to do so by section 5240, which invites courts to do whatever they want to correct the piteous draftsmanship of the CPLR.

At t_3 , A recorded her purchase money mortgage. Suppose A never recorded. Does *X* still buy free of *JC* at t_5 ? If we can agree that *X*, however awkwardly, is described in section 5203(a)(2), it makes no difference whether A records or not. Recordation is for the benefit of *subsequent purchasers*.¹⁹⁶ *JC* is neither subsequent nor a purchaser¹⁹⁷ and therefore is doubly not the beneficiary of the recording act. So *X*'s rights are the same, whether or not A records.¹⁹⁸

In the Sixth Scenario, A was second in time but first in right (by means of *X* falling within the terms of section 5203(a)(2)). In the Seventh Scenario, A is a purchase money lender but *not* second in time:

Seventh Scenario

t_1 : *JC* docket a judgment, but *JD* owns no real estate.

t_2 : In anticipation of acquiring land from V, *JD* delivers a mortgage deed to A.

t_3 : Minutes after *JD* delivers the mortgage deed to A, *JD* acquires real estate from V. V delivers a deed to *JD* and *JD* pays V with proceeds supplied by A, a mortgage lender.

t_4 : *JC* serves an execution on the sheriff, who holds a sale, where Y is the buyer.

¹⁹⁵ See *United States v. Miller*, 400 F. Supp. 1080, 1083 (S.D.N.Y. 1975) (so assuming).

¹⁹⁶ See N.Y. REAL PROP. LAW § 291 (McKinney 2008) (second sentence).

¹⁹⁷ See *infra* text accompanying notes 276–282.

¹⁹⁸ See RESTATEMENT (THIRD) OF PROPERTY (MORTGAGES) § 7.2(b) (1997) (“A purchase money mortgage, *whether or not recorded*, has priority over any mortgage, lien, or other claim that attaches to the real estate but is created by or arises against the purchaser-mortgagor prior to the purchaser-mortgagor’s acquisition of title to the real estate.” (emphasis added)).

t_5 : A declares a default by *JD* and arranges a foreclosure sale, where *X* is the buyer.

In the Seventh Scenario, *JC* has no lien at t_1 and *A* has no purchase money mortgage at t_2 . So far *JD* has no real estate, so neither *JC* nor *A* can have liens on *JD*'s property. At t_3 , *JD* obtains real estate from *V*. At this precise moment, *JC*'s lien attaches to *JD*'s after-acquired property. And, at the same moment, *A*'s mortgage lien attaches to *JD*'s property. Chronologically, the liens attach simultaneously.

According to the preamble to section 5203(a), no transferee after docketing is valid against *JC*. Here, *A* has a transfer after docketing. Is *A* therefore junior to *JC*? By no means. Section 5203(a)(2) describes *X*, or so we shall assume. If we read past the bad draftsmanship of section 5203(a)(2), *X* takes free and clear of *JC* and will pay a price that accords with this status. *A* is the beneficiary of *X*'s status. This prospective benefit justifies the conclusion that *A*'s purchase money mortgage is senior to *JC*'s lien, whether *A* is second in time or chronologically equal to *JC*.

To be distinguished is the case in which *JD* is not the borrower of the purchase money. Recall the facts of *Department of Housing Preservation & Development v. Ferranti*¹⁹⁹.

t_1 : *JC* docketes against *JD*, who owned fee simple absolute.

t_2 : *JD* sells the equity to *B*.

t_3 : *B* grants a mortgage to *C*.

t_4 : After *B* defaults, *C* arranges a foreclosure sale, where *C* is the buyer.

t_5 : *JC* serves an execution on the sheriff, and the sheriff sells to *X*.

In *Ferranti*, *C* was a purchase money lender, but CPLR 5203(a)(2) cannot help *C* here. The statutory reason for this is that *C* did not finance "the purchase price of the judgment debtor's interest in the property."²⁰⁰ Rather, *C* financed *B*'s interest in the property. *B* was not the judgment debtor. The policy answer for this is that, if *C* won in the above case, it would be an easy matter for *JD* to defeat *JC* in all cases by selling to a buyer with a purchase money lender. If this were the rule, judicial liens would be quite worthless.

Purchase money superpriority reflects the fact that the lender is the founder of the feast. Without the purchase money

¹⁹⁹ 212 A.D.2d 438, 622 N.Y.S.2d 717 (1st Dep't 1995).

²⁰⁰ N.Y. C.P.L.R. 5203(a) (McKinney 2008) (emphasis added).

loan, *JD* would never have acquired the property. In *Ferranti*, however, *C* never advanced funds to *JD* and *C* was not the founder of the feast. For that reason, *C* did not deserve priority.

E. Who Owns the Proceeds?

A sale pursuant to a judicial lien is all about generating cash proceeds to pay judgments. Who owns these proceeds?

Classically, only foreclosed parties have sold something to the buyer. Only these parties have a claim to proceeds. The foreclosed parties would include the debtor, the enforcing lien creditor and any transferee that is junior to the enforcing lien. The rule of distribution is first in time is first in right with the proviso that the owner of the debtor equity—the residual owner—is always in last place.²⁰¹

The CPLR completely violates the classic model. According to CPLR 5236(g):

After deduction for and payment of fees, expenses and any taxes levied on the sale, transfer or delivery, the sheriff making a sale of real property pursuant to an execution shall, unless the court otherwise directs,

1. distribute the proceeds to the judgment creditors who have delivered executions against the judgment debtor to the sheriff before the sale, which executions have not been returned, in the order in which their judgments have priority, and
2. pay over any excess to the judgment debtor.²⁰²

Under this statute, only *JCs* who have served executions on the sheriff and also *JD* have any claim to proceeds.²⁰³ No other junior party has an express entitlement to proceeds. So, if *JD* has conveyed a junior mortgage to *B* or if *JD* sells the equity to *X*, the sheriff sells free of *B* or *X*, but *JD* gets the surplus.²⁰⁴ Meanwhile, senior *JCs* who do not serve an execution by the time

²⁰¹ See *supra* text accompanying notes 37–38.

²⁰² N.Y. C.P.L.R. 5236(g).

²⁰³ The appearance of a senior *JC* at the execution sale to announce the senior lien therefore does nothing to improve *JC*'s rights. See *id.* 5236(e) ("A judgment creditor duly notified . . . who fails to deliver an execution to the sheriff prior to the sale shall have . . . no further interest in the proceeds of the sale."); *Meadow Brook Nat'l Bank v. Goodkin*, 53 Misc. 2d 1099, 1100, 280 N.Y.S.2d 978, 979 (Sup. Ct. Nassau County 1966), *aff'd*, 28 A.D.2d 648, 282 N.Y.S.2d 441 (2d Dep't 1967).

²⁰⁴ See *Bank Leumi Trust Co. v. Sibthorp*, 116 A.D.2d 451, 452, 496 N.Y.S.2d 439, 440 (1st Dep't 1986). But see *Neshewat v. Salem*, 365 F. Supp. 2d 508, 527 (S.D.N.Y. 2005), *aff'd*, No. 05-1954-cv, 2006 WL 2456810 (2d Cir. Aug. 23, 2006).

of the sale have no right to be paid according to their priority.²⁰⁵ This is so even though the senior *JC* loses the lien.

Section 5236(g), however, does have a wild card in it: The priority rules apply "*unless the court otherwise directs.*"²⁰⁶ Along with section 5240, which invites courts to do whatever they want,²⁰⁷ section 5236(g) itself invites courts to circumvent its own drafting flaws. One court used this license to permit a junior mortgagee to participate in the foreclosure proceeds.²⁰⁸ Another court permitted a transferee from the debtor to participate in the surplus, even though the transferee had no money judgment and had served no execution on the sheriff.²⁰⁹ CPLR 5239 aids in this enterprise. According to section 5239:

Prior to the application of property . . . to the satisfaction of a judgment, any interested person may commence a special proceeding against the judgment creditor or other person with whom a dispute exists to determine rights in the

²⁰⁵ The statute requires the sheriff to distribute proceeds to *JCs* "in the order in which their judgments have priority." N.Y. C.P.L.R. 5236(g). But judgments as such don't have priority. See *H.R. & C. Co. v. Smith*, 242 N.Y. 267, 269, 151 N.E. 448, 449 (1926) ("[E]xcept as provided by statute, a mere judgment is never a lien against the real estate of the judgment debtor."). Courts, however, understand this phrase to mean that priority is according to the rule of first in time is first in right with regard to docketing or levying. *Nat'l Instalment Corp. v. Sacks*, 56 Misc. 2d 346, 347, 288 N.Y.S.2d 667, 668-69 (Sup. Ct. Nassau County 1968). Priority is to be determined at the time of the sale, not the time of the distribution of the proceeds. In *Federal Land Bank v. United States*, 21 A.D.2d 936, 937, 250 N.Y.S.2d 999, 1000 (3d Dep't 1964), A's foreclosure sale was during the life of *JC*₁'s lien. By the time of the distribution, *JC*₁'s lien had expired. *Id.* Nevertheless, *JC*₁ was permitted to participate in the distribution. *Id.*

²⁰⁶ N.Y. C.P.L.R. 5236(g).

²⁰⁷ Judge Edward Greenfield once warned:

This broad discretionary power gives the court a certain degree of leeway in applying the procedures set forth in Article 52, but surely it does not empower the court to ignore those procedures or issue an order contrary to the statute. It is one thing to modify or limit a provision. It is another thing entirely to ignore one provision and create a wholly new one in its place. Section 5240 [of the CPLR] permits a certain amount of tinkering on the structure by the judicial handyman, but it does not permit the construction of an entirely new wing using jurisprudential architecture.

Kaplan v. Supak & Sons Mfg. Co., 46 Misc. 2d 574, 578, 260 N.Y.S.2d 374, 378 (N.Y. Civ. Ct. N.Y. County 1965).

²⁰⁸ *Bank Leumi Trust Co. v. Liggett*, 115 A.D.2d 378, 379-81, 496 N.Y.S.2d 14, 15-16 (1st Dep't 1985) (junior foreclosed mortgagee permitted to participate in distribution according to priority); see also Siegel, *supra* note 6, at 143-44 (approving of such a use of section 5239).

²⁰⁹ *Barbaro v. Maher*, 56 Misc. 2d 650, 652, 289 N.Y.S.2d 719, 721 (Sup. Ct. Nassau County 1968).

property The court may . . . direct the disposition of the property²¹⁰

Meanwhile, section 5236(g) holds that, where JC_1 and JC_2 docket judgments in sequence and JC_1 serves an execution on the sheriff, JC_2 has a right to proceeds only if JC_2 serves an execution on the sheriff “before the sale.” Nevertheless, it is still true that a sheriff holds the cash surplus for JD . This is JD ’s personal property, which can be reached by JC_2 ’s writ of execution. In *Preston Farms, Inc. v. Nacri*,²¹¹ JC_2 served an execution *after* the sale but before the sheriff distributed the proceeds. The court ruled that JC_2 had no right to the surplus under CPLR 5236(g),²¹² but JC_2 could still garnish JD ’s personal property, which the sheriff happened to control.²¹³ Therefore, JC_2 was able to reach the surplus after all.²¹⁴ The result would have been otherwise if the sheriff had already disbursed the funds to JD by the time JC_2 ’s execution had been delivered to the sheriff.²¹⁵

Where JC_2 serves an execution but JC_1 does not, in spite of due notification pursuant to CPLR 5236(c), can JC_1 maintain that JC_2 takes proceeds in trust for JC_1 ? According to 5203(a)(1), no transfer is good against JC_1 after she docket, except

a transfer or the payment of the proceeds of a judicial sale, which shall include an execution sale, in satisfaction either of a judgment *previously so docketed* or of a judgment where a notice of levy pursuant to an execution thereon *was previously so filed*²¹⁶

This exception seems to say that, if there were an earlier JC than JC_1 and if, subsequent to JC_1 ’s docketing, that earlier JC receives proceeds of an execution sale, the transfer of cash to the earlier JC is free and clear of JC_1 ’s lien. In other words, CPLR

²¹⁰ N.Y. C.P.L.R. 5239.

²¹¹ 42 A.D.2d 668, 345 N.Y.S.2d 696 (3d Dep’t 1973) (mem.).

²¹² *Id.* at 669, 345 N.Y.S.2d at 698.

²¹³ *Id.* at 670, 345 N.Y.S.2d at 699.

²¹⁴ *Id.*

²¹⁵ *Accord* May v. Finnerty, 104 Misc. 2d 450, 451–52, 428 N.Y.S.2d 570, 571–72 (Sup. Ct. Suffolk County 1980). Suppose JC_2 had bid in its judgment in lieu of paying cash. This would never be allowed if JC_1 had served its execution prior to the sale; a junior lien creditor can never bid in where a senior creditor has not been paid. *Walker v. Littleton (In re Littleton)*, 888 F.2d 90, 93 (11th Cir. 1989). But where JC_1 loses seniority by failing to serve the execution, the bid in is proper, and the sheriff holds no surplus that JC_1 can execute upon. In such a case, JC_1 loses out.

²¹⁶ N.Y. C.P.L.R. 5203(a)(1) (McKinney 2008) (emphasis added).

5203(a)(1) is a *personal property* rule, not a real property rule. The negative pregnant of (a)(1) is that, where JC_2 receives proceeds, the judgment is *not* good against JC_1 . According to this implication, JC_2 therefore takes proceeds in trust for JC_1 . Professor David Siegel argues against this negative pregnant:

In my judgment, such a proceeding [by JC_1 against JC_2] should not be permitted if [JC_1] has been duly notified under CPLR 5236(c) and has not issued an execution to the sheriff in response to the notice. The 5236(c) procedure, combined with the directions to the sheriff contained in 5236(e), seem to afford every opportunity to [JC_1] to protect his rights even where he may have been remiss in failing to issue an execution before [JC_2] did so. . . . If he has been duly notified and has not issued such an execution, ought the law to do anything further for him?²¹⁷

No court has permitted JC_1 to retrieve proceeds from JC_2 , where JC_1 received due notice. But the action has been allowed where JC_1 was never notified of the sale. In such a case, JC_1 has a claim that her due process rights have been violated. The consequences of such a claim I will discuss in the context of whether the CPLR's sales procedure is constitutional.²¹⁸

F. *Bidding In*

The CPLR sets no minimum amount a buyer at an auction must bid to constitute a valid sale. In contrast, New York mortgage law holds open the possibility of setting aside a foreclosure sale when the price bid is too low. In *Polish National Alliance v. White Eagle Hall Co.*,²¹⁹ the court suggested that any bid that is ten percent or less of the fair market value per se shocks the judicial conscience, justifying a set-aside of the sale.²²⁰ Anything above fifty percent leaves the conscience unscarred.²²¹

It is also true of mortgage law that, when the mortgage lender seeks a deficiency judgment, the amount of it is unrelated to the nominal bid of the mortgage lender or third party. Rather, the deficiency is calculated by subtracting the fair market value

²¹⁷ Siegel, *supra* note 6, at 129.

²¹⁸ See *infra* text accompanying notes 245–274.

²¹⁹ 98 A.D.2d 400, 470 N.Y.S.2d 642 (2d Dep't 1983).

²²⁰ See *id.* at 408, 470 N.Y.S.2d at 649.

²²¹ See *id.*

of the premises from the mortgage debt.²²² In effect, mortgage law expects the mortgage lender to bid in the mortgage debt up to the fair value of the premises. The deficiency will be judged as if the lender had fulfilled this duty.

In *Wandschneider v. Bekeny*,²²³ the court borrowed from mortgage law to supplement the CPLR under the promiscuous authority of section 5240, which provides: "The court may at any time . . . make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure."²²⁴ In *Wandschneider*, *JC* bought \$27,000 worth of *JD*'s equity for a bid of \$500.²²⁵ The court ordered *JC*'s judgment reduced by \$27,000, not \$500.²²⁶ The court also refused to cancel the sale itself or interfere with *JC*'s title.²²⁷

Wandschneider may have been overruled in *Guardian Loan Co. v. Early*,²²⁸ where *JC* began an execution sale and *X*, a third party, was the buyer.²²⁹ *X* paid \$1,268 for property worth perhaps \$48,000.²³⁰ *JD* moved to set the sale aside for having generated so low a price. This relief was granted by the lower courts but the New York Court of Appeals reversed. Part of its rationale was policy based:

After the sale has been consummated, the interests of persons other than the judgment debtor and creditor are implicated. Title to property has been transferred, often to a stranger to the

²²² N.Y. REAL PROP. ACTS. LAW § 1371(2) (McKinney 2008).

²²³ 75 Misc. 2d 32, 346 N.Y.S.2d 925 (Sup. Ct. Westchester County 1973).

²²⁴ *Id.* at 35, 346 N.Y.S.2d at 928 (quoting N.Y. C.P.L.R. 5240 (McKinney 2008)).

²²⁵ *Id.* at 34, 346 N.Y.S.2d at 927.

²²⁶ *Id.* at 38, 346 N.Y.S.2d at 931. An odd feature of *Wandschneider* is that *JC*'s judgment was entered in federal court. *JC* had docketed with the clerk in Westchester County in order to generate a lien on *JD*'s real property. So what the *Wandschneider* court was doing was instructing the federal court as to the size of *JC*'s judgment following the auction by the sheriff. The court specifically found it had the power to do so. *Id.* at 38–39, 346 N.Y.S.2d at 931–32. This seems to me quite right. Suppose state law provided for strict foreclosure of judicial liens, so that *JC* became the owner of the fee simple without an auction. Such a procedure would have required a valuation of the property, and this would have been binding on the federal court; federal legislation demands that federal judgments be enforceable by state sheriffs, and this must be according to state law. 28 U.S.C. § 1962 (2000). *Wandschneider* is not far from a rule of strict foreclosure—whenever *JC* wins the auction. And so the state court's valuation is binding on the federal court.

²²⁷ *Accord In re Bachner*, 82 Misc. 2d 107, 108–09, 368 N.Y.S.2d 749, 750–51 (Sup. Ct. Nassau County 1975) (third party paid forty-one percent).

²²⁸ 47 N.Y.2d 515, 392 N.E.2d 1240, 419 N.Y.S.2d 56 (1979).

²²⁹ *Id.* at 517, 392 N.E.2d at 1241, 419 N.Y.S.2d at 58.

²³⁰ *Id.* at 518, 392 N.E.2d at 1242, 419 N.Y.S.2d at 58.

judgment who relies on the regularity of the sale and proceeds accordingly. To permit these sales to be set aside merely because a beneficial price has not been obtained especially in view of the "at any time" provision of CPLR 5240, would discourage participation by third parties at judicial sales, for the title acquired at the sale would never be free from the spectre of judicial invalidation.²³¹

This policy justification is based primarily on the presence of a third party. Yet at another moment, the *Early* court seems to be making a rule about the use of the CPLR 5240 wildcard.

But while CPLR 5240 grants the courts broad discretionary power to alter the use of the procedures set forth in article 52, *it has no application after a Sheriff's sale has been carried out and the deed delivered to the purchaser, at which time the use of the enforcement procedure will have been completed . . .*²³²

So is *Wandschneider* overruled? Some courts have assumed not.²³³ And it is possible to reconcile the two cases. *Wandschneider* speaks to the amount of *JC*'s judgment in light of the auction. It does not disturb the rights of the buyer at the execution sale. *Early* prohibits the use of CPLR 5240 to compromise the title that the buyer obtains by virtue of the sheriff's deed. An open question is whether a court is prepared to knock down *JC*'s judgment by the fair market value of the premises when a third party—not *JC*—wins the auction. No court has so held,²³⁴ although this is the rule for mortgage

²³¹ *Id.* at 520, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59–60.

²³² *Id.* at 519–20, 392 N.E.2d at 1243, 419 N.Y.S.2d at 59 (emphasis added).

²³³ For cases following *Wandschneider*, see *Trepel v. Dippold*, No. 04 Civ. 8310 (DLC), 2006 U.S. Dist. LEXIS 78050 (S.D.N.Y. Oct. 27, 2006); *Yellow Creek Hunting Club, Inc. v. Todd Supply, Inc.*, 145 A.D.2d 679, 535 N.Y.S.2d 222 (3d Dep't 1988).

²³⁴ In *Stochastic Decisions, Inc. v. Wagner*, 34 F.3d 75 (2d Cir. 1994), *JD* fraudulently conveyed land to *X*, in order to hinder *JC*. *X* then sold the land on credit to *Y*, so that *X* held a purchase money mortgage on the property. *Id.* at 77. Since *Y* was a good faith purchaser, *Y* took much of the title free and clear of *JC*'s right. See N.Y. DEBT. & CRED. LAW § 278 (McKinney 2008). When the dust settled, only *X*'s purchase money mortgage could properly be viewed as the fraudulent conveyance. *Wagner*, 34 F.3d at 79–81.

Later, *JC* won a judgment against *JD*. Part of the relief obtained was the award of *X*'s mortgage to *JC*, with power of *JC* to foreclose the mortgage against *Y*. In effect, *JC*'s fraudulent conveyance theory awarded *JC* a judicial lien on *X*'s mortgage, with the proviso that *JC* did not have to sell *X*'s mortgage at an execution sale; rather, *JC* was empowered to collect the mortgage debt. And this was done by selling *Y*'s real property in a foreclosure sale. *Id.*; see also *Bank of Tokyo Trust Co. v. Urban Food Malls Ltd.*, 229 A.D.2d 14, 24, 650 N.Y.S.2d 654, 661–62 (1st Dep't 1996) (Article 9 secured party could proceed directly to collection by means of mortgage foreclosure).

foreclosures.²³⁵ Such a holding would make sense for judicial liens as well.

At least one court has proclaimed *Wandschneider* overruled, or at least limited, by *Early*. In *Mikulec v. United States*,²³⁶ *JC* had docketed against *JD*. *JD*'s mother (*X*) bought *JC*'s lien just before a scheduled execution sale.²³⁷ The judgment in question was for \$121,008.44.²³⁸ Then *X* bid in \$50 of her judgment and won the auction.²³⁹ Among the foreclosed parties was a junior federal tax lien.

The Internal Revenue Service ("IRS") has, by federal law, a redemption right after an execution sale.²⁴⁰ According to 28 U.S.C. § 2410(d):

At the sale, *JC* won the auction, bidding less than the fair market value of the premises. *Wagner*, 34 F.3d at 77. *JD* then claimed that section 1371(2) of the Real Property Actions and Proceedings Law ("RPAPL") required that *JC*'s judgment against *JD* be reduced by the amount of the fair market value of the premises. *Id.* at 78. The district court agreed and knocked down *JC*'s judgment by the fair market value of the premises. *Id.* at 79.

The court of appeals wisely reversed. If section 1371(2) of the RPAPL applied to the case, it applied to protect *Y* against *X*. An entirely different question was whether *JC*'s low bid should affect the size of *JC*'s judgment against *JD*. As *JD* no longer owned the land when *JC* (via *X*'s mortgage) sold *Y*'s property, *JD* was in no position to claim the protections of section 1371(2) the RPAPL. *Id.*

Was the procedure of permitting *JC* to enforce *X*'s mortgage consistent with New York law? Neither New York's version of the Uniform Fraudulent Conveyance Act nor the CPLR give any advice for pursuing fraudulent conveyances of real estate. CPLR 5225 authorizes actions against third parties, but only with regard to personal property. See N.Y. C.P.L.R. 5225 (McKinney 2008). One possible interpretation of the case is that *X*'s right against *Y* was personal property. Article 9 so characterizes *X*'s mortgage rights. U.C.C. § 9-308(e) (2005). Accordingly, CPLR 5225 applies: *JC* is a judgment creditor whose "rights to the property are superior to those of the transferee." N.Y. C.P.L.R. 5225.

If this follows, then *JC* was proceeding against *Y* by turnover order. It was simply collecting a payment intangible from *Y* (by means of selling *Y*'s real property). Accordingly, the judgment of *JC* should be reduced by the amount actually collected, not by the fair market value of *Y*'s real property.

²³⁵ N.Y. REAL PROP. ACTS. LAW § 1371(2) (McKinney 2008).

²³⁶ 705 F.2d 599 (2d Cir. 1983).

²³⁷ *Id.* at 600.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ 26 U.S.C. § 7425(d)(1) (2000). The statute states:

(1) *Right to redeem*.—In the case of a sale of real property to which subsection (b) applies to satisfy a lien prior to that of the United States, the Secretary may redeem such property within the period of 120 days from the date of such sale or the period allowable for redemption under local law, whichever is longer. *Id.*

In any case in which the United States redeems real property . . . the amount to be paid for such property shall be the sum of—

(1) the actual amount paid by the purchaser at such sale (which, in the case of a purchaser who is the holder of the lien being foreclosed, shall include the amount of the obligation secured by such lien to the extent satisfied by reason of such sale)²⁴¹

X claimed that the redemption price was \$121,008.44, because, under *Wandschneider*, her judgment was knocked down by the fair market value of the property (which apparently exceeded the amount of the judgment). The IRS claimed the redemption price was \$50 plus interest.²⁴²

The *Mikulec* court agreed with the IRS, on the ground that *Wandschneider* had been limited by the *Early* decision: "We conclude, therefore, that under *Guardian Loan* [section] 5240 cannot be used to invalidate sales or to adjust rights following a transfer of title regardless of the identity of the purchaser."²⁴³

The *Mikulec* court nevertheless went on to hold that *Wandschneider* was correctly decided. The holding was limited to the case in which *JD* moved to knock down the judgment according to the fair market value of the property bought by *JC*. This motion, however, had to be made before the sheriff's deed was delivered to *JC*. Furthermore, this motion would not be made under section 5240, but under general principles of equity.²⁴⁴ But where a judgment debtor does not make this

²⁴¹ 28 U.S.C. § 2410(d)(1).

²⁴² *Mikulec*, 705 F.2d at 600.

²⁴³ *Id.* at 602.

²⁴⁴ The *Early* court does hold open the possibility that a sale could be overturned on the equities, for which it almost entirely cites mortgage cases. The only judicial lien case cited was *Colonial Steel Corp. v. Piquin Inc.*, 74 Misc. 2d 273, 344 N.Y.S.2d 505 (N.Y. Civ. Ct. Queens County 1973), where a marshal held an execution sale of personal property without very much notice and at a price that was only about ten percent of the fair market value. In asserting this equitable power, the *Early* court also warned that inadequacy of price alone was not sufficient to justify the overturn of a sale. *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 521, 392 N.E.2d 1240, 1244, 419 N.Y.S.2d 56, 60 (1979).

It should be emphasized that the *Early* court's analysis of equity entirely dealt with the power to overturn the sale, not the power of the court to declare what the outstanding judgment was, following a bid-in. The *Mikulec* court follows a law review comment that states "that if the facts in *Wandschneider* were before the Court of Appeals today, the use of equity, but not CPLR 5240, would be consistent with the *Guardian Loan* decision." 705 F.2d at 602 (quoting Robert W. Corcoran, Jr.,

motion, *JC*'s judgment is reduced only by the amount actually bid. In *Mikulec*, *JD* had not moved to knock down *JC*'s judgment (now owned by *X*). Accordingly, the redemption price for the IRS was only \$50.

Mikulec, a case in which *X* sought declaratory relief as to the redemption price the IRS had to pay, must be viewed as an "Erie guess" as to the nature of state law. So it is illuminating to review the subsequent case of *Yellow Creek Hunting Club, Inc. v. Todd Supply, Inc.*,²⁴⁵ where *JC* obtained a judicial lien on *JD*'s land. *JD* subsequently sold some of the encumbered land to *X*. *JC* then obtained an execution sale on what land *JD* still retained and bid in a low amount. *JC* then sought an execution sale of *X*'s land. *X* responded by seeking *Wandschneider*-style relief against *JC*—a declaration that *JC* had been paid in full in the first execution sale. On the reasoning of *Mikulec*, this motion should have been denied. The sheriff's deed had already been issued to *JC* and the setoff was being sought by a third party, not by *JD*. Nevertheless, the *Yellow Creek* court granted *Wandschneider* relief and held that *JC*'s judgment had been entirely satisfied. This is good evidence that *Mikulec* is a bad *Erie* guess.²⁴⁶

Putting *Mikulec* together with *Yellow Creek*, the law would appear to be this: Where *JD* or some other party in interest except *JC* seeks an adjustment of *JC*'s judgment, the court may grant it by reducing *JC*'s judgment by the fair market value of the property *JC* received by bidding in. But in federal redemption cases, *JC* is estopped from claiming that the amount paid for real property exceeds the amount *JC* purported to bid. Meanwhile, CPLR 5240 cannot be used to overturn the sale, at least where a third party has won the auction and has received the deed. A reversal of the sale is possible, however, where the sheriff has not yet issued a deed. An unanswered question is whether a court will knock down *JC*'s judgment when a third party bids less than the fair market value at an auction sale. The analogy to mortgage law points to a positive answer.

The Survey of New York Practice, Article 52—Enforcement of Money Judgments, 54 ST. JOHN'S L. REV. 416, 420 n.176 (1980)).

²⁴⁵ 145 A.D.2d 679, 535 N.Y.S.2d 222 (3d Dep't 1988).

²⁴⁶ Also relevant is *Hoffman v. Seniuk*, where the court upheld setting aside the entire sale, so long as this could be done before the sheriff's deed was actually delivered. 88 A.D.2d 954, 954, 451 N.Y.S.2d 191, 192 (2d Dep't 1982). It is not clear from the *Hoffman* opinion whether the winner of the auction was also *JC* or not.

G. Constitutional Difficulties

According to the Fifth Scenario:

t_1 : JC_1 docket.

t_2 : JC_2 docket.

t_3 : JC_2 serves an execution, but JC_1 never does.

t_4 : At the execution sale, based on JC_2 's execution, X is the buyer.

Relative to this scenario, CPLR 5236(e) provides: "A judgment creditor duly notified pursuant to subdivisions (c) or (d) who fails to deliver an execution to the sheriff prior to the sale shall have no further lien on the property" This sentence says that, in the above example, *if JC is properly notified*, JC_1 has no lien after the sheriff sells under JC_2 's execution. This instantly raises the question: What if JC_1 was *not* properly notified? Failure to notify JC_1 raises the issue of whether JC_1 's due process rights to notice and a hearing have been violated.

The CPLR delegates to JC the task of accumulating the list of names and addresses of JD and any person with an interest in the land to be sold (as of forty-five days before the sale).²⁴⁷ The sheriff must then send notice of the sale to everyone on the list by certified or registered mail thirty days before the sale.²⁴⁸ This gives JCs on the list thirty days to serve an execution on the sheriff, in order to perfect their right to a distribution of the sales proceeds.

This procedure entails constitutional difficulties, where a party in interest foreclosable by JC is left off the list by JC . The problem is exacerbated by the fact that, where JC_2 is junior to JC_1 and JC_2 commences the sale by serving an execution, JC_2 has every incentive to leave JC_1 off the list, because JC_2 's priority improves if JC_1 serves no execution on the sheriff.

In *First Federal Savings & Loan Ass'n v. McKee*,²⁴⁹ JC_2 was left off the list by JC_1 . JC_2 claimed that the buyer took subject to JC_2 's lien. The court rejected this claim and held that the buyer took free of JC_2 's lien by virtue of CPLR 5236(c), which provides: "An omission to give any notice required by this or the following subdivision . . . does not affect the title of a purchaser without

²⁴⁷ N.Y. C.P.L.R. 5236(c) (McKinney 2008).

²⁴⁸ *Id.*

²⁴⁹ 61 Misc. 2d 693, 696, 305 N.Y.S.2d 589, 592 (Sup. Ct. Nassau County 1969).

notice of the omission or offense.”²⁵⁰ In consolation, the *McKee* court proffered some suggestions to *JC*₂. First, it suggested that the sale could be overturned, if a right has been prejudiced.²⁵¹ But how could this be, in light of the court’s reliance on the last sentence of 5236(c)? Surely overturning the sale is possible only if the buyer has knowledge of the defect.²⁵²

Second, the court more plausibly remarked: “If he holds a judgment senior to that of the levying creditor, he can maintain an action against the latter to recover the proceeds of sale to the extent of his judgment”²⁵³ In other words, if *JC*₁ is senior and *JC*₂ leaves *JC*₁ off the list required by section 5236(c), *JC*₂ may have the power to foreclose *JC*₁’s lien, but a court of equity will view this power as used strictly for the benefit of *JC*₁. On this view, the proceeds received by *JC*₂ are held in constructive trust for *JC*₁. If *JC*₁ can trace these proceeds into the estate of *JC*₂, *JC*₁ can enforce the trust and require the turnover of the proceeds. If the money cannot be traced, then *JC*₂ has committed

²⁵⁰ The court also held that a *lis pendens* filed in connection with the foreclosure of senior mortgages would not put the buyer on notice, even though the *lis pendens* referred to *JC*₂ as a party. Only actual notice would deprive the buyer of the protection of CPLR 5236(c)’s last sentence. *Id.* at 695, 305 N.Y.S.2d at 591.

²⁵¹ *Id.* at 696, 305 N.Y.S.2d at 592; *accord* *May v. Finnerty*, 104 Misc. 2d 450, 452, 428 N.Y.S.2d 570, 572 (Sup. Ct. Suffolk County 1980).

²⁵² Courts are divided whether section 5236(c)’s last sentence applies when the buyer is *JC*. In *Gersten-Hillman Agency Inc. v. Lichtenstein & Friedman Realty Corp.*, 182 A.D.2d 1041, 1043, 583 N.Y.S.2d 56, 58 (3d Dep’t 1992), the court set aside a sale to *JC* even though *JC* had no knowledge of the procedural mistake of the sheriff. It implied that the last sentence of section 5236(c) does not apply when the buyer is the judgment creditor. *See id.* at 1042, 583 N.Y.S.2d at 57. It also suggested that CPLR 2003, which permits judicial sales to be overturned for failure to give notice, simply overrides CPLR 5236(c). *See id.*, 583 N.Y.S.2d at 58. In *Todd Supply, Inc. v. Hodgkiss*, 133 A.D.2d 1006, 1006, 521 N.Y.S.2d 157, 158 (3d Dep’t 1987), the sheriff served *JD* by registered mail only. This satisfies section 5236(c), but the court, inexplicably, ruled that the sheriff must comply with CPLR 308, which requires affixing notice to *JD*’s residence, in addition to mail. *Id.* at 1006, 521 N.Y.S.2d at 157–58. *JC* purchased at the sale, not knowing of the defect. *Id.* at 1006, 521 N.Y.S.2d at 157. Later, *JC* grew disappointed with his purchase and therefore tried to have the sale overturned because *JD* received improper notice. *Id.* at 1006, 521 N.Y.S.2d at 158. The court pointed out that *JC* is entitled and indeed required to rely on the last sentence of section 5236(c) for good title. *Id.* at 1007, 521 N.Y.S.2d at 158.

²⁵³ *McKee*, 61 Misc. 2d at 696, 305 N.Y.S.2d at 592; *see also* Siegel, *supra* note 6, at 130 (supporting *JC*₁’s suit against *JC*₂). Of course, *JC*₁ never levied but only docketed and served an execution.

the tort of conversion, and JC_1 may have a money judgment against JC_2 .²⁵⁴

The United States Supreme Court has addressed due process rights of foreclosed junior lien creditors in *Mennonite Board of Missions v. Adams*.²⁵⁵ In this case, a municipal taxing authority had power to foreclose any property claimant to land. It commenced a foreclosure proceeding, sending notice to the fee owner. No notice was sent to a mortgagee, however. The Supreme Court held that, since it knew the name of the junior mortgagee (though not the address), the tax lienor had a duty to send a letter to the mortgagee. The tax lienor could not rely on the fee owner to notify his mortgagee: "Notice to the property owner, who is not in privity with his creditor and who has failed to take steps necessary to preserve his own property interest, also cannot be expected to lead to actual notice to the mortgagee."²⁵⁶ Nor could the theoretical ability of the mortgagee to monitor the property excuse the tax lienor's due process duty.²⁵⁷

Just as notice to the mortgagor could not reasonably imply notice to the mortgagee, so, under the CPLR, delegation of the notice function to JC_1 or JC_2 does not suffice to assure that all the other judgment creditors (or other property claimants) will be notified. It can hardly be doubted that the CPLR is unconstitutional for delegating an important part of the notice

²⁵⁴ Similar analysis solves the following dilemma:

Eighth Scenario

t_1 : JC_1 docket.

t_2 : JD grants a mortgage to B .

t_3 : JC_2 docket.

t_4 : JC_2 delivers an execution to the sheriff who schedules a foreclosure sale.

JC_1 never does, because JC_1 never received notice of the sale.

t_5 : At JC_2 's execution sale, X buys.

Even though JC_2 started the sale, JC_1 is foreclosed. See N.Y. C.P.L.R. 5203(a)(3). This means that the sheriff had power to sell whatever JC_1 had (even if JC_2 's execution started the sales process). Accordingly, B 's mortgage is foreclosed. But proceeds are held by JC_2 in constructive trust, first for JC_1 , then for B . Expropriating JC_1 's lien is also the expropriation of B 's junior mortgage. The law should presume that JC_2 does this for the benefit of JC_1 and B .

²⁵⁵ 462 U.S. 791 (1983).

²⁵⁶ *Id.* at 799. The use of the word privity is odd, because the owner of the fee and the mortgagee had in fact signed a mortgage agreement and were in privity of contract. Presumably, the court meant to say that the mortgagor was not the agent of the mortgagee and was simply not worthy of trust by the tax lienor to send the notice.

²⁵⁷ See *id.*

function to a private party whose interests may well align against notifying senior forecloseable parties.

Indeed, the Supreme Court of New Jersey has so ruled with regard to a judicial lien procedure quite similar to that of the CPLR.²⁵⁸ In *New Brunswick Savings Bank v. Markouski*,²⁵⁹ the following chronology unfolded:

*t*₁: *H* and *W*, tenants by the entirety, jointly convey a mortgage to *A*, which *A* has recorded.

*t*₂: *JC*₁ docketed a judgment against *H*. By virtue of docketing, *JC*₁ has a lien on *H*'s share. We are not told the size of *JC*₁'s judgment.

*t*₃: *JC*₂ docketed against *H*.

*t*₄: *JC*₁ commences an execution sale by serving an execution on the sheriff. As required by New Jersey law, *JC*₁ compiles a list of property owners, but leaves *JC*₂ off the list.²⁶⁰ As a result the sheriff sends no notice to *JC*₂.

*t*₅: At the execution sale, *X* buys for \$7,000.

*t*₆: *A* forecloses and sells to *Y*. A surplus results.

As to this surplus, *W* of course received her share. *H* did not, as *H* was foreclosed at *t*₅. *X* had bought *H*'s share, but *JC*₂ claimed priority to it. The court ruled that, because of the notice defect at *t*₄, *JC*₂'s lien was not extinguished; therefore *JC*₂ had some sort of right to the proceeds.

What remedy is appropriate? In *Markouski*, the court emphasized that *X*, as a bona fide purchaser, was entitled to some protection, but not to the total surplus which, but for the due process error, *X* would have owned outright. The court noted that, according to a concession by *JC*₂, at a minimum, *X* should

²⁵⁸ For example, in New Jersey, junior *JCs* can foreclose senior *JCs*, just as in New York. See N.J. STAT. ANN. § 2A:17-39 (West 2008).

²⁵⁹ 587 A.2d 1265 (N.J. 1991).

²⁶⁰ As in New York, *JC*₂ is delegated the job of notifying third parties affected by the sale:

The party who obtained the order or writ shall, at least 10 days prior to the date set for sale, serve a notice of sale by registered or certified mail, return receipt requested, upon (1) every party who has appeared in the action giving rise to the order or writ and (2) the owner of record of the property as of the date of commencement of the action whether or not appearing in the action

N.J. CT. R. ANN. 4:65-2. Under this provision *JC*₁ is obligated to notify "owners" of an execution sale. Apparently, judgment creditors are not considered owners for this purpose. In any case, *JC*₁ commenced an execution sale but did not send notice to *JC*₂.

get back the \$7,000 it bid at *JC*₁'s execution sale.²⁶¹ It remanded for further refinements.

The situation at hand is close to the phenomenon of the omitted necessary party in mortgage foreclosures. To illustrate the law of the omitted party, consider the following scenario:

Ninth Scenario

*t*₁: *D* grants a mortgage to *A*.

*t*₂: *D* grants a mortgage to *B*.

*t*₃: *A* starts a foreclosure proceeding and forgets to make *B* a party.

*t*₄: At the foreclosure sale, *X* is the buyer.

If proper procedure had been followed, *X* should have purchased a fee simple absolute estate. This fee simple is made up of *D*'s equity, *A*'s mortgage, and *B*'s mortgage. All of these interests should have been foreclosed. *B*, however, was not foreclosed, because she received no notice. But the sale is otherwise effective to convey to *X* the interest of *A* and *D*. This means that *X* has bought *A*'s senior mortgage, as well as *D*'s equity. Because *X* is subrogated to *A*'s mortgage, it is open for *X* to foreclose again. In addition, in New York²⁶² as well as in New Jersey,²⁶³ *A* is entitled to strict foreclosure against *B*. *B* is invited to redeem by a deadline or be forever foreclosed.

In *Markouski*, however, reforeclosure or strict foreclosure were not appropriate remedies, because *A* had already foreclosed upon both *X* and *JC*₂. Their rights could only be vindicated by a share of the cash surplus generated in the foreclosure sale. Using the above analysis of *X*'s title, *X* should be deemed subrogated to *JC*₁'s judgment. We know in *Markouski* that *X*

²⁶¹ *Markouski*, 587 A.2d at 1278 ("We note Heritage's concession in its briefs filed below that Equity is entitled to be reimbursed for at least the \$7,000 it paid at the initial sale.").

²⁶² N.Y. REAL PROP. ACTS. LAW § 1523(2) (McKinney 2008). The statute states:

If it shall appear to the court . . . that the defect in the foreclosure proceedings was not due to fraud or wilful neglect of the plaintiff and that the defendant or the person under whom he claims was not actually prejudiced thereby, the judgment may fix a time for redemption of the property and provide that a failure to redeem within such time shall thereafter preclude the defendant from redeeming the property or claiming any right, title or interest therein.

Id.

²⁶³ See generally *Citicorp Mortgage, Inc. v. Pessin*, 570 A.2d 481 (N.J. Super. Ct. App. Div. 1990) (allowing assignees of a second mortgage who had not been named in a foreclosure action to pay off a senior mortgage).

paid \$7,000 and that JC_2 conceded X should receive this amount, but properly this should only be so where JC_1 's judgment exactly equals \$7,000. X should be entitled to the full amount of JC_1 's judgment, since that is what X validly bought at the imperfect execution sale. On the other hand, if JC_1 's judgment is less than \$7,000, X should receive JC_1 's judgment only. Thereafter, JC_2 has priority. If JC_2 is fully paid, X can obtain the surplus, as X bought H 's equity at t_5 .

If the *Markouski* facts were to be transposed to New York, however, CPLR 5236(c) poses an obstacle to the remedy described. According to CPLR 5236(c), "[a]n omission to give any notice . . . does not affect the title of a purchaser without notice of the omission or offense."²⁶⁴ Therefore, where X has no knowledge of the omission, X 's title must be viewed as sacrosanct. The only possible remedy is for the sheriff to pay JC_2 for the loss, in exchange for which the state would be subrogated to JC_2 's judgment.²⁶⁵

Where X does have notice of the defect, revival of JC_2 's lien is appropriate. It should be possible for a court to craft a reforeclosure and even a strict foreclosure procedure. Although the CPLR has abolished redemption in judicial lien cases,²⁶⁶ this was aimed at getting rid of post-sale redemption, which notoriously has a bad effect on bidding at all sales.²⁶⁷ It should not be viewed as preventing pre-foreclosure redemption. Nor should abolition of post-sale redemption prevent a strict foreclosure remedy (tied to a post-sale right of JC_2 to redeem) under the broad equity power conferred by CPLR 5240.²⁶⁸

Where JC_2 serves the execution and omits JC_1 from the list, and where JC_2 bids in, it should be the case that JC_1 has an equitable lien on JC_2 's land. According to the logic of equity liens, JC_2 has purchased debtor equity from JD . Equity should

²⁶⁴ Another seemingly relevant idea is N.Y. C.P.L.R. 5236(e): "A judgment creditor duly notified . . . who fails to deliver an execution to the sheriff prior to the sale shall have no further lien on the property . . ." Of course, JC_2 has *not* been notified, so the statute does not apply, but its negative pregnant should be rejected. That is, even though JC_2 was not notified, it does not follow that JC_2 therefore has a lien. This negative pregnant would contradict the direct command of N.Y. C.P.L.R. 5236(c).

²⁶⁵ See Siegel, *supra* note 6, at 135–36.

²⁶⁶ See *supra* text accompanying notes 159–162.

²⁶⁷ See Siegel, *supra* note 6, at 122–23.

²⁶⁸ N.Y. C.P.L.R. 5240 (McKinney 2008).

consider that this acquisition by JC_2 was for the benefit of JC_1 .²⁶⁹ In a second foreclosure sale commenced by JC_1 , JC_2 could have the surplus after JC_1 is fully paid. The reason an equitable lien (not a docketing lien) is appropriate is that if we said JC_1 obtains a revival of the judicial lien, then bona fide purchasers from JC_2 would be subject to JC_1 's lien. If, on the other hand, JC_1 has a mere equitable lien, JC_2 's bona fide purchasers would take free and clear of JC_1 . Any other result would distress subsequent title searchers.

We have said that where the buyer at a foreclosure sale has no notice of defective notification, the buyer's title cannot be compromised.²⁷⁰ Another rule applies where the constitutional defect is in the judgment itself, whereunder the land was sold. Salient here is the possibility that JD was never served with process, resulting in a default judgment. Under such circumstances, JD is entitled to relief from the judgment.²⁷¹ It is also the case that where JC has served an execution on the sheriff and the sheriff has sold to X , X 's title must be negated.²⁷² According to CPLR 5237:

The purchaser of property sold by a sheriff pursuant to execution or order may recover the purchase money from the judgment creditors who received the proceeds if the property is recovered from such purchaser in consequence of an irregularity in the sale or a vacatur, reversal or setting aside of the judgment upon which the execution or order was based. If a judgment for the purchase money is so recovered against a judgment creditor in consequence of an irregularity in the sale, such judgment creditor may enforce his judgment as if no levy or sale had been made, and, for that purpose, he may move without notice for an order restoring any lien or priority or amending any docket entry affected by the sale.²⁷³

²⁶⁹ Such an attitude is called estoppel by deed. Typically, this doctrine holds that where a person purports to convey something she does not have and then later acquires the very thing supposedly conveyed, the acquisition is deemed for the benefit of the wronged transferee who had earlier received nothing. *Mickles v. Townsend*, 18 N.Y. 575, 582-83 (1859).

²⁷⁰ See N.Y. C.P.L.R. 5236(c).

²⁷¹ See *id.* 5015(a)(4).

²⁷² See *McCracken v. Flanagan*, 141 N.Y. 174, 176-78, 36 N.E. 10, 10-11 (1894).

²⁷³ N.Y. C.P.L.R. 5237.

Where the sale is reversed, poundage is not reimbursed by the sheriff; rather, *JC* must bear this expense.²⁷⁴

When the defect is no service of process prior to the default judgment, it must actually be true that no service of process occurred. In *Roosevelt Hardware v. Green*,²⁷⁵ *JC* and *JD* consensually agreed that the default judgment would be vacated for failure to serve process. The court held this insufficient to reverse *X*'s title. It remanded for a hearing on whether historically there really was no service of process. *X* could not lose title *solely* because *JC* and *JD* stipulated between themselves that service of process was defective.

IV. THE RECORDING ACT

A. *Judgment Creditors Are Not Purchasers*

JC can foreclose any grantee of the debtor whose interest arises after the judgment is locally docketed or levied.²⁷⁶ Conversely, *JC* cannot foreclose a transferee whose interest arises prior to these points in time, with the exception that prior judicial liens can be foreclosed by subsequent *JCs*.²⁷⁷

Pre-lien grantees of a *JD* may suffer consequences, however, if they do not record their conveyances. According to New York's recording statute:

Every . . . conveyance not . . . recorded is void as against any person who subsequently purchases or acquires by exchange or contracts to purchase or acquire by exchange, the same real property or any portion thereof, or acquires by assignment the rent to accrue therefrom as provided in section two hundred ninety-four-a of the real property law, in good faith and for a valuable consideration, from the same vendor or assignor, his distributees or devisees, and whose conveyance, contract or assignment is first duly recorded, and is void as against the lien upon the same real property or any portion thereof arising from payments made upon the execution of or pursuant to the terms of a contract with the same vendor, his distributees or devisees,

²⁷⁴ *Roosevelt Hardware v. Green*, 72 A.D.2d 261, 266, 424 N.Y.S.2d 276, 279 (2d Dep't 1980).

²⁷⁵ 72 A.D.2d 261, 424 N.Y.S.2d 276.

²⁷⁶ N.Y. C.P.L.R. 5202(a).

²⁷⁷ *Id.* 5203(a)(2).

if such contract is made in good faith and is first duly recorded.²⁷⁸

Significant for our purposes is that an unrecorded conveyance is void as against purchasers and other voluntary property claimants. A purchase connotes a voluntary conveyance.²⁷⁹ A judicial lien, however, is not a purchase. Unrecorded conveyances are perfectly good against subsequent lien creditors.²⁸⁰ So in *Suffolk County Federal Savings & Loan Ass'n v. Geiger*,²⁸¹ *JD* conveyed an unrecorded mortgage to *A*, and *JC* docketed a judgment. Although the procedure is unclear, *JC* apparently sought a declaration that its judicial lien was senior to the prior unrecorded mortgage of *A*. The court ruled for *A*: "[I]t is well settled that the protection of the recording act can be relied upon only by subsequent purchasers and mortgagees, not by judgment creditors" ²⁸²

Similarly, in *Rivas v. McDonnell*,²⁸³ *JC*, under the same circumstances, held an execution sale. One day before the auction, *A*, throwing off his slough, and moving with fresh legerity, recorded his mortgage. At the auction, *X* was the buyer. The court properly held that, even if *X* was a bona fide purchaser, *X*'s title was still subject to *A*'s mortgage. *JC* had no standing under the recording act and so *X* could not claim "shelter" under the status of this lien.

Prior to the passage of the Bankruptcy Code in 1978, bankruptcy trustees were considered to be lien creditors on the

²⁷⁸ N.Y. REAL PROP. LAW § 291 (McKinney 2008).

²⁷⁹ *Id.* § 290(2) ("The term 'purchaser' includes every person to whom any estate or interest in real property is conveyed for a valuable consideration, and every assignee of a mortgage, lease or other conditional estate.").

²⁸⁰ See, e.g., *FDIC v. Malin*, 802 F.2d 12, 20 (2d Cir. 1986); *United States v. Certain Lands*, 41 F. Supp. 636, 637 (E.D.N.Y. 1941); *Sullivan v. Corn Exch. Bank*, 154 A.D. 292, 295-97, 139 N.Y.S. 97, 100-01 (2d Dep't 1912). The same is generally true for equitable interests in real property. See, e.g., *Lafayette Trust Co. v. Beggs*, 213 N.Y. 280, 287-88, 107 N.E. 644, 646 (1915); *Blum v. Krampner*, 28 N.Y.S.2d 62, 64 (Sup. Ct. Suffolk County 1940), *aff'd*, 261 A.D. 989 (2d Dep't 1941) (granting *A* an injunction to prevent sheriff's sale).

In *Maryland Casualty Co. v. Stern*, 5 Misc. 2d 423, 139 N.Y.S.2d 11 (Sup. Ct. Kings County 1955), *JD* may or may not have conveyed an unrecorded mortgage to *A*. *JC* then docketed a judgment. *A* subsequently recorded. The court, suspecting that *JD* and *A* were lying about the mortgage, ruled that it would presume the mortgage deed was delivered on the day of recordation. That is to say, the court found that *JC* was first in time and *A*'s unrecorded mortgage was second in time.

²⁸¹ 57 Misc. 2d 184, 291 N.Y.S.2d 982 (Sup. Ct. Suffolk County 1968).

²⁸² *Id.* at 186, 291 N.Y.S.2d at 985.

²⁸³ 308 A.D.2d 572, 764 N.Y.S.2d 870 (2d Dep't 2003).

day of bankruptcy.²⁸⁴ On the basis of the foregoing, unrecorded mortgages in New York were perfectly valid in bankruptcy.²⁸⁵ The Bankruptcy Code now makes the trustee a bona fide purchaser of real estate who has recorded.²⁸⁶ As a result, bankruptcy spells doom for the unrecorded mortgage in New York.

B. Good Faith Buyers at Execution Sales

Suppose, however, an execution sale is added to the mix:

Tenth Scenario

t_1 : *JD* grants *A* a mortgage. *A* never records.

t_2 : *JC* docketts a judgment.

t_3 : *JC* serves an execution on the sheriff who schedules an execution sale.

t_4 : At the execution sale, *X* is the buyer. *X* is a bona fide purchaser who records the sheriff's deed.

In the Tenth Scenario, *JC* is no purchaser, but *X* is. Properly, *X* should take free and clear of *A*. The sheriff can convey anything that *JD* could have conveyed. In effect, the sheriff's deed must be treated as *JD*'s deed. And since *JD* has power to convey free of *A*, so does the sheriff.²⁸⁷

The law in New York, however, is contradictory on this point. Arguably, the governing authority is *Maroney v. Boyle*,²⁸⁸ which involved the following:

t_1 : *A* has an equitable lien on *O*'s property.²⁸⁹

t_2 : *O* conveys to *JD*, but *JD* has knowledge of *A*.

t_3 : *JC* docketts against *JD*.

t_4 : *JC* commences an execution sale, where *C* is the buyer. *C* is a bona fide purchaser.

In *Maroney*, *C* took free and clear of *A*. The court, quoting its earlier opinion in *Hetzel v. Barber*,²⁹⁰ held:

²⁸⁴ Bankruptcy Act of 1898, ch. 41, § 70(a), 30 Stat. 544 (repealed 1978).

²⁸⁵ See *Heiman v. Parnass*, 40 F.2d 558, 559 (E.D.N.Y. 1930).

²⁸⁶ 11 U.S.C. § 544(a)(3) (2000).

²⁸⁷ See *Grid Realty Corp. v. Fazzino*, 55 A.D.2d 635, 636, 390 N.Y.S.2d 169, 170–71 (2d Dep't 1976), *aff'd*, 42 N.Y.2d 1048, 369 N.E.2d 768, 399 N.Y.S.2d 212 (1977); *Beman v. Douglas*, 1 A.D. 169, 171, 37 N.Y.S. 859, 861 (3d Dep't 1896).

²⁸⁸ 141 N.Y. 462, 36 N.E. 511 (1894).

²⁸⁹ This arose because *A* had tendered purchase money to *O* and presumably expected to receive the grant of a mortgage lien at a future time, which never materialized.

²⁹⁰ 69 N.Y. 1 (1877).

A sheriff's deed, given in pursuance of a judgment and a sale upon execution, is treated as if given by the judgment debtor himself. It conveys precisely what he could have conveyed when the judgment was docketed. . . . The grantee in such cases holds, not under the sheriff, but under the debtor, and the deed, when recorded, is protected by, and has the benefit of, the [R]ecording [A]ct.²⁹¹

Hetzel was a case in which *JD* conveyed to *A* in an unrecorded deed.²⁹² *JC* docketed, and, in the ensuing execution sale, *X* was the buyer. *X* recorded the certificate of sale from the sheriff. *X* was held to have taken title free of *A*'s unrecorded conveyance.²⁹³

²⁹¹ *Maroney*, 141 N.Y. at 469, 36 N.E. at 512-13 (quoting *Hetzel*, 69 N.Y. at 9-10).

²⁹² *Hetzel*, 69 N.Y. at 8.

²⁹³ *Id.* at 15-16. The text gives a very simplified account of the case. In *Hetzel*, *T* owned "the Dennis place." *Id.* at 2. In a will, she conveyed one-third to *JD*, her husband, and two-thirds to her two daughters. *Id.* at 3. By the will, *JD* had power to sell the daughters' two-thirds and invest the proceeds, which they were to receive upon attaining the age of 25. *Id.* *JD* then leased the premises to *Y*. *Id.* at 4. Subsequently, *JD* deeded his one-third to *A*, who did not record (*A*'s first deed). *Id.* *JD* did not purport to use his power over the daughters' share. *Id.* *JC* then docketed a judgment. *Id.* at 8. At an execution sale, *X* was the buyer. *Id.* *X* had no knowledge and recorded the sheriff's certificate of sale. *Id.* at 8-9. By this action *X* took free and clear of *A*, for one-third of the Dennis place. *Id.* *X* sold his interest to *Y*. *Id.* at 10. *Y* obtained the sheriff's deed and recorded it. *Id.*

Meanwhile, the daughters sold their two-thirds to *Y*. *Id.* Subsequently, *JD* conveyed the whole of the Dennis place to *A* (*A*'s second deed). *Id.* at 11. That is, *JD* purported to use his power of sale over the daughters' former two-thirds and also purported to use the power to sell his own one-third, even though *A* had this by an earlier unrecorded deed. *A* finally recorded all the deeds he had. *Id.* He then sued to evict *Y*. *Y* prevailed as to one-third because *X* was a bona fide purchaser who recorded first and who therefore took free of *A* (for one-third). *Id.* at 10. As to the remaining two-thirds, although *JD* had power over the daughters' share, they were not precluded from "taking back" the real property from their father and selling it free and clear of *JD*'s power. *Id.* at 13. *JD*'s subsequent deed to *A* was therefore too late.

An interesting feature of the case is that *A*'s second deed was recorded before *Y* recorded the sheriff's deed. The court still decided for *Y*. The court did not rely on the fact that the certificate of sale was filed before *A*'s second deed was filed. This might have made *X* a bona fide purchaser who recorded first (even though *X* had not yet received a deed). Rather, the court ruled that since the first deed gave *A* *JD*'s personal one-third, the second deed was ineffective to give *A* anything. Therefore, even though *A* recorded the second deed first, it was meaningless as to the one-third. Rather, *Y* recorded the sheriff's deed before *A* had filed the first deed. What this suggests is that if *A* loses a deed and then tries to record a replacement deed, *A* has not actually recorded and may fail as to a subsequent purchaser. Perhaps filing the replacement deed puts everyone on inquiry notice that *A* may have some rights, although this is a close question. See *Harper v. Paradise*, 210 S.E.2d 710, 714 (Ga. 1974) ("[A] deed in the chain of title, discovered by the investigator, is constructive notice of all other deeds which were referred to in the deed discovered" (quoting

Hetzel was a proper recording act case. *Maroney*, however, was not. Rather, *Maroney* entailed whether a fiduciary (*O*) could sell free of *A*'s equitable interest. Nevertheless, both cases agree that the sheriff inherits, as it were, *O*'s power to sell free of earlier unrecorded or equitable interests.²⁹⁴

Muddying the waters is *Clute v. Emmerich*²⁹⁵:

*t*₁: *JD* conveys a mortgage to *A*, who records.

*t*₂: *JC* docketts against *JD*.

*t*₃: *JD* sells his equity to *B*. *B* pays off *A*'s mortgage claim. *A* files the required "satisfaction piece," which notifies the world that *A* has been paid.

*t*₄: *JC* serves an execution on the sheriff, who schedules an execution sale.

*t*₅: At the execution sale, *X* is the buyer. *X* had no knowledge of *B*.

At *t*₃, *B* was subrogated to *A*'s mortgage. That is to say, the law deems that *A* has conveyed the mortgage to *B*. *X*, however, claimed to take free of *B*'s mortgage. Subrogation claims are equitable in nature. They are no good against bona fide purchasers for value, where a mortgage satisfaction is on record. The *Clute* court, however, held that since *JC* was no purchaser, *Y* was not either:

The judgment rendered is criticised as in direct violation of the [R]ecording [A]cts. That [X] bought the property at a sale on execution, when [A's] mortgage was discharged of record; that she became such purchaser in good faith and for value, as the trial court expressly found; and that a practical revival of the satisfied mortgage sweeps away the protection of the record, and works gross injustice to one who has trusted to it,- [sic] is the substantial argument made. But we do not see that the [R]ecording [A]cts affect the question. Whatever of good faith attended [X's] purchase at the execution sale, she could gain by it no better or stronger right than the creditor would have got if

Talmadge Bros. & Co. v. Interstate Bldg. & Loan Ass'n, 31 S.E. 618 (1898))). In *Harper*, however, the recorded replacement directly referred to the earlier deed, whereas this is not clear from the opinion in *Hetzel*.

²⁹⁴ Granted that *O* had power over *A*, but how did *JD* have a like power, when *JD* was a bad faith purchaser from *O*? Although the court does not explain, it must be the case that when *O* conveyed to *JD*, *O* conveyed *O*'s power over *A*. *JD* then conveyed this power to the sheriff. The sheriff then used the power to kill off *A*'s equitable lien. *Maroney* proves that the power of *O* to convey free and clear to bona fide purchasers is itself a conveyable property interest.

²⁹⁵ 99 N.Y. 342, 2 N.E. 6 (1885).

he had been the purchaser. She took only what the judgment could give, and bought at the peril of disappointment as to the existence or scope of its lien. The maxim of *caveat emptor* applied to her purchase, and she has no ground of complaint if she is given an interest in the land precisely commensurate with the actual lien of the judgment under which she bought. The record told her that such lien was only upon Hall's equity of redemption, and was subject, when obtained, to [A's] mortgage. The judgment creditor had no equitable right to anything more. If more came by an enlargement of the lien, that was simply the creditor's good fortune; if it did not so come, the good fortune vanished, but no right of the creditor was invaded. [X's] purchase, therefore, gave her, outside of her legal right, no equity to have the property freed from the incumbrance to which the judgment itself was subject. Her struggle is to retain the benefit of an accidental and unintended extension of the judgment lien, to which she was in no way equitably entitled, at the expense of others acting in ignorance and through mistake.²⁹⁶

B's subrogation rights were therefore preserved against X, a bona fide purchaser at an execution sale.

What, then, is the law of New York on JC₁'s ability to expropriate D's ability to convey free of earlier unrecorded conveyances? *Hetzel* (1877) is the only member of our trio supporting JC's power that is truly a recording act case. *Clute* (1885) is a case about an equitable lien. *Maroney* (1894) was also a case about an equitable lien. It overrules *Clute*, so that *Hetzel* is the governing authority for the recording act and *Maroney* the governing authority for a sheriff's power to sell free of purely equitable property interests.²⁹⁷

The rule should not change where JC bids in her judgment at the execution sale. JC becomes a purchaser at this point. Nevertheless, one case seems to hold otherwise. In *Domestic & Foreign Discount Corp. v. Beuerlein*,²⁹⁸ D made an unrecorded conveyance of a cotenancy to his mother. JC docketed and, just days before its docketing lien died, JC served an execution on the

²⁹⁶ *Id.* at 349-50, 2 N.E. at 6-7 (citation omitted).

²⁹⁷ *Accord* *Grid Realty Corp. v. Fazzino*, 55 A.D.2d 635, 390 N.Y.S.2d 169 (2d Dep't 1976) (sheriff could sell free of claim that D's absolute title was actually a mortgage); *Beman v. Douglas*, 1 A.D. 169, 37 N.Y.S. 859 (3d Dep't 1896) (buyer at execution sale took free of equitable interest arising from real estate sales contract).

²⁹⁸ 54 N.Y.S.2d 548 (Sup. Ct. Monroe County 1944).

sheriff.²⁹⁹ The sheriff held the execution sale, where *JC* was the buyer.³⁰⁰ Claiming to be a cotenant, *JC* moved for a partition sale. The court, however, ruled that *JC* had no status under the recording act and therefore denied *JC*'s motion.³⁰¹ Although the court never quite addressed *JC*'s bona fides,³⁰² if *JC* was without knowledge of the unrecorded conveyance, *JC*, as a purchaser at the execution sale, should have prevailed. *JC*'s docketing lien against *D* was not voluntary, but the sheriff sold to *JC* as a buyer. The seller was not a purchaser, but the buyer was.

V. FUTURE ADVANCES UNDER SENIOR MORTGAGES

In New York, a mortgage may secure advances made to the debtor after the mortgage deed is delivered.³⁰³ But mortgagees, if they have notice of the existence of these transferees, may not make advances to the prejudice of junior transferees of a debtor.³⁰⁴

In the language of a UCC debate about the nature of the security interests, New York follows the unitary view of mortgages.³⁰⁵ That is to say, once a mortgage is created, its priority comprehends whatever amount the agreement provides for, including discretionary advances. But New York also follows a doctrine of equitable subordination: If a lender knowingly "squeezes out" an intervening party by making an optional future

²⁹⁹ *Id.* at 549.

³⁰⁰ Although *JC* never extended the lien and apparently the sheriff never levied, the court upheld the propriety of the execution sale. This accords with the view that if the execution is served on the sheriff while the execution sale is alive, the sale can proceed. *See supra* text accompanying notes 59–66.

³⁰¹ *Id.* at 550.

³⁰² *JC* did, however, claim that the unrecorded conveyance was also a fraudulent conveyance. The court ruled that the statute of limitations had run on fraudulent conveyance avoidance, and it refused to toll the statute until *JC* had discovered the existence of the conveyance. *Id.* So *JC* was claiming no knowledge of the conveyance at some point of the process.

³⁰³ *State Bank v. Fioravanti*, 51 N.Y.2d 638, 641, 417 N.E.2d 60, 61, 435 N.Y.S.2d 947, 948 (1980).

³⁰⁴ *Ackerman v. Hunsicker*, 85 N.Y. 43, 51 (1881) (advanced senior lien over intervening docketing lien, where senior lender had no knowledge of the docketing lien).

³⁰⁵ The alternative view is that every new advance creates a new lien—the multiple theory. David Gray Carlson & Paul M. Shupack, *Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code: Part I*, 5 CARDOZO L. REV. 287, 347 n.255 (1984).

advance, the lender is equitably subordinated to the intervening party, to the extent of the offending advance.³⁰⁶

A leading case for this proposition is *Ackerman v. Hunsicker*,³⁰⁷ where *JD* granted *A* a mortgage with a future advance clause in it. *JC* obtained a docketing lien.³⁰⁸ Thereafter, *A* guaranteed *JD*'s note to a lender.³⁰⁹ The court held that *A*'s guaranty was a discretionary advance as to which *A* had seniority generally, and *JC* had no cause to demand the equitable subordination of *A*'s post-lien advance.³¹⁰ Although *JC*'s docketing was "constructive notice" to future parties, it provided no notice to prior parties.³¹¹

A similar case is *Wallach v. Brosnahan (In re Brosnahan)*,³¹² where *D* granted *A* a mortgage which *A* never recorded. Thereafter, *JC* docketed a judgment. Judge Carl Bucki held that, in general, *A* had priority as to discretionary future advances, but it also held open the possibility that *A* could be equitably subordinated (as a matter of New York law) if *A* advanced with knowledge of the harmful effect on *JC*.³¹³

The *Brosnahan* case is complicated by the fact that *D* had filed for bankruptcy. As a result, the bankruptcy trustee could avoid *A*'s unrecorded mortgage³¹⁴ and preserve it for the benefit of the bankruptcy estate.³¹⁵ So it was the bankruptcy trustee who was asserting *A*'s seniority under New York law. This leads to a paradoxical situation. If *A* had made good faith advances to *D* without knowledge of *JC*,³¹⁶ the trustee benefited because his priority over *JC* (derivative from *A*) was vindicated. If the advances were in bad faith, then the trustee was harmed, because *JC*'s priority was preserved. It is not ordinarily the case

³⁰⁶ See *Shultis v. Woodstock Land Dev. Assocs.*, 188 A.D.2d 234, 236, 594 N.Y.S.2d 890, 892 (3d Dep't 1993), *aff'd*, 195 A.D.2d 677, 599 N.Y.S.2d 340; *Skaneateles Savs. Bank v. Herold*, 50 A.D.2d 85, 88, 376 N.Y.S.2d 286, 289 (4th Dep't 1975), *aff'd*, 40 N.Y.2d 999, 359 N.E.2d 701, 391 N.Y.S.2d 107 (1976).

³⁰⁷ 85 N.Y. 43.

³⁰⁸ *Id.* at 45-46.

³⁰⁹ *Id.* at 45.

³¹⁰ *Id.* at 48.

³¹¹ *Id.* at 52.

³¹² 312 B.R. 220 (Bankr. W.D.N.Y. 2004).

³¹³ *Accord* *Thomas v. Kelsey*, 30 Barb. 268 (N.Y. Sup. Ct. 1859).

³¹⁴ 11 U.S.C. § 544(a)(3) (2000).

³¹⁵ *Id.* § 551.

³¹⁶ In *Brosnahan*, *A* was the adult child of *D*; they were unlikely to be have been good faith advancers. 312 B.R. at 222.

that a bankruptcy trustee fears bad faith advances to a bankrupt just prior to a bankruptcy proceeding.

In 1985, the New York Legislature enacted section 281(2) of the Real Property Law, in order to strengthen the position of senior mortgagees making discretionary future advances:

Any credit line mortgage may, and when so expressed therein, shall secure not only the original indebtedness but also the indebtedness created by future advances thereunder . . . whether such advances are obligatory or are to be made at the option of the lender or otherwise, to the same extent and with the same priority of lien as if such future advances had been made at the time such credit line mortgage was recorded . . . although there may have been no advances made at the time of the execution and acknowledgment of such credit line mortgage, and although there may be no indebtedness outstanding at the time any advance is made.³¹⁷

This provision, however, requires the credit line mortgage³¹⁸ to be recorded. Because the mortgage in *Brosnahan* was not recorded, section 281(2) did not apply to aid the bankruptcy trustee.³¹⁹

What if *A* had recorded and the statute applied? Does it authorize bad faith advances to *D* in derogation of *JC*'s rights? The *Brosnahan* court suggested so: "Compliance with this statute is like hitting a home run in baseball. It assures a score . . ." ³²⁰ But as George Brett learned in the famous "pine tar incident," ³²¹ a home run does not assure a score. If *A* knowingly gives an advance to an insolvent *D* in order to squeeze

³¹⁷ N.Y. REAL PROP. LAW § 281(2) (McKinney 2008).

³¹⁸ A credit line mortgage is defined as

any mortgage or deed of trust, other than a mortgage or deed of trust . . . made pursuant to a building loan contract as defined in subdivision thirteen of section two of the lien law, which states that it secures indebtedness under a note, credit agreement or other financing agreement that reflects the fact that the parties reasonably contemplate entering into a series of advances, payments and readvances, and that limits the aggregate amount at any time outstanding to a maximum amount specified in such mortgage or deed of trust.

Id. § 281(1)(a).

³¹⁹ 312 B.R. at 224.

³²⁰ *Id.*

³²¹ See Christopher H. Clancy & Jonathan A. Weiss, *A Pine Tar Gloss on Quasi-Legal Images*, 5 CARDOZO L. REV. 411, 421 & nn.31-33 (1984); Joseph Lukinsky, *Law in Education: A Reminiscence with Some Footnotes to Robert Cover's Nomos and Narrative*, 96 YALE L.J. 1836, 1855-56 (1987) (the pine tar incident "constituted . . . the most widespread popular legal debate in American history" (emphasis omitted)).

the lien of *JC*, then *JC* has a fraudulent conveyance claim against *A*.³²² For example, suppose the equity in *D*'s house is worth \$100 and *JC*'s lien is for precisely \$100. *A*, knowing of *JC*, makes an advance of \$100. Under the statute, *A* is senior, but *A* has made *JC* into an unsecured creditor for \$100. As an unsecured creditor, *JC* should have no trouble showing that \$100 worth of *A*'s mortgage is an intentional fraudulent conveyance,³²³ and *A* cannot claim to be a bona fide purchaser of this portion of her mortgage.³²⁴

VI. RENTS

A peculiar type of property is the right of a landlord to collect rent from her tenants. Even more peculiar is how New York judicial liens attach to these rights.

Some basic principles concerning rents need to be rehearsed. First, the obligation of a tenant to pay rent runs with the land,³²⁵ meaning, among other things, that whoever owns the reversion has the right to collect the rent.³²⁶ Let us call the forward-looking obligation of a tenant to pay rent a "rent receivable." New York law insists that the rent receivable is real property.³²⁷ Indeed, the reversionary interest of the landlord is nothing but the rent receivable (during the duration of the lease) coupled with a right of possession after the lease ends.

Yet, once the rent receivable is actually paid, the proceeds are considered the landlord's personal property. It is said that collection of the rent "severs" the dollars from the real

³²² Brett's home run was initially ruled fraudulent but this was reversed on appeal, and the home run was justly restored to Brett. Clancy & Weiss, *supra* note 321, at 438.

³²³ See N.Y. DEBT. & CRED. LAW § 276 (McKinney 2008) ("Every conveyance made and every obligation incurred with actual intent . . . to hinder, delay, or defraud either present or future creditors, is fraudulent . . .").

³²⁴ If, as in *Brosnahan*, *JD* is bankrupt, the trustee will have a serious impediment getting this fraudulent conveyance away from *JC*. In New York, *JC*'s docketing lien supposedly attaches to whatever property *JD* fraudulently conveyed to *A*. See *infra* text accompanying notes 385–412.

³²⁵ *Glassman v. Hyder*, 23 N.Y.2d 354, 367, 244 N.E.2d 259, 266, 296 N.Y.S.2d 783, 793 (1968) (Keating, J., dissenting).

³²⁶ *King v. Kaiser*, 3 Misc. 523, 524, 23 N.Y.S. 21, 22 (N.Y.C. C.P. Gen. T. N.Y. County 1893); *Payn v. Beal*, 4 Denio 405, 409–10 (N.Y. Sup. Ct. 1847) (citing Lord Coke).

³²⁷ See *ABKCO Indus., Inc. v. Apple Films, Inc.*, 39 N.Y.2d 670, 674, 350 N.E.2d 899, 901, 385 N.Y.S.2d 511, 513 (1976); see also *Chase Manhattan Bank v. Brown & E. Ridge Partners*, 243 A.D.2d 81, 83–84, 672 N.Y.S.2d 206, 207–08 (4th Dep't 1998).

property.³²⁸ Collecting rent is like harvesting crops. While attached to the earth, rent receivables and crops are part of the earth itself. But when rent is collected and the crops harvested, the dollars and crops are unencumbered personal property.³²⁹

A lien on the reversionary interest in real property encumbers the rent receivables. Yet, so long as the landlord owns the reversion, the landlord may collect the rent and harvest the crops free and clear of the lien. Thus, where a landlord collects rents and leaves the senior lien unpaid, the landlord does not convert to her own use the property of the lienholder. "Conversion"—wrongful interference with the tangible *personal* property of another³³⁰—cannot exist here, because, once the rents are collected, they are the landlord's personal property as to which no real estate lien attaches.³³¹

Eventually, a lien creditor, whether a consensual mortgagee or a *JC*, will sell the reversion to a buyer in a foreclosure sale. After the sale, the buyer owns the reversion and therefore now has the right to collect the rent receivables.

New York law, however, permits mortgagees to dispossess the defaulting mortgagor even before the foreclosure sale. If the mortgage agreement so provides, a mortgagee may obtain the appointment of a receiver in an *ex parte* hearing.³³² This is a change from common law, which required the showing of waste or a showing that the property was insufficiently valuable to reimburse the mortgagee for the loan upon foreclosure.³³³

The effect of appointing a receiver is that the owner of the reversion is dispossessed. The landlord loses the right to collect rent receivables, which now belong to the receiver. If the

³²⁸ Wyckoff v. Scofield, 98 N.Y. 475, 479 (1885) ("When these moneys came to the possession of the defendant's agent it operated as an effectual severance of the rents from the mortgaged property . . .").

³²⁹ See David Gray Carlson & Paul M. Shupack, *Judicial Lien Priorities Under Article 9 of the Uniform Commercial Code: Part II—Creditor Representatives, Bank Receivers, Fixtures, Crops and Accessions*, 5 CARDOZO L. REV. 823, 849–57 (1984).

³³⁰ Roemer & Featherstonhaugh P.C. v. Featherstonhaugh, 267 A.D.2d 697, 697, 699 N.Y.S.2d 603, 604 (3d Dep't 1999).

³³¹ But see Citation Mortgage, Ltd. v. Ormond Beach Assocs. (*In re Ormond Beach Assocs.*), 184 F.3d 143, 155–56 (2d Cir. 1999) (Florida law).

³³² See Friedman v. Gerax Realty Assocs., 100 Misc. 2d 820, 821, 420 N.Y.S.2d 247, 248 (Sup. Ct. Nassau County 1979).

³³³ Dart v. W. Sav. & Loan Ass'n, 438 P.2d 407, 409–10 (Ariz. 1968) (Arizona law). A more recent Arizona statute brings it into line with the New York reform. ARIZ. REV. STAT. ANN. § 33-702(B) (2008).

landlord nevertheless insists on collecting, the receiver may treat the money collected as held in trust for the receiver. Now, if the landlord pockets the rents, she commits the tort of conversion, for which she will have personal liability (even if the underlying mortgage is non-recourse).³³⁴

Although the law of rents is usually expressed in the context of consensual mortgages, it should apply straightforwardly to the enforcement of a judicial lien on a reversionary interest. Since the rent receivable is real property, a docketing or levying lien attaches to it.³³⁵ The landlord, however, continues to have the right to harvest the rents free and clear of the judicial lien.³³⁶ The CPLR gives *JC* a right to a receiver. Any such receiver "may be authorized to administer, collect, improve, lease or repair or sell any real . . . property"³³⁷ of the debtor. When the receiver appears, the landlord's ability to collect rent free and clear of the judicial lien should come to an end.³³⁸

Suppose, however, we have the following:

Eleventh Scenario

*t*₁: *JD* leases the premises to *T*.

*t*₂: *JD* grants a mortgage to *A*, who records.

*t*₃: *JC* docketes against *JD*.

*t*₄: *JC* obtains a receiver to take possession of *JD*'s reversionary interest.

*t*₅: *A* obtains a receiver for the same purpose.

In the Eleventh Scenario, *JC* (through her receiver) has the right to collect from *T* starting at *t*₄ and ending at *t*₅. At *t*₅, *A* (through the receiver) has an even better right of possession. So *A*'s receiver dispossesses *JC*'s receiver, just as *JC* dispossessed *JD*. Whatever *JC*'s receiver has collected from *T* prior to *t*₅, *JC*'s

³³⁴ *Citation Mortgage, Ltd. v. Ormond Beach Assocs. Ltd. P'ship* (*In re Ormond Beach Assocs. Ltd. P'ship*), 184 F.3d 143, 155 (2d Cir. 1999) (nonrecourse Florida mortgage).

³³⁵ See *Glassman v. Hyder*, 23 N.Y.2d 354, 360, 244 N.E.2d 259, 261, 296 N.Y.S.2d 783, 787 (1968).

³³⁶ *S & H Bldg. Materials Corp. v. European-Am. Bank & Trust Co.*, 104 Misc.2d 249, 253, 428 N.Y.S.2d 140, 143 (Sup. Ct. Suffolk County 1980) ("[P]rior to the appointment of a receiver . . . the owner would have been entitled to collect the rents . . .").

³³⁷ N.Y. C.P.L.R. 5228(a) (McKinney 2008).

³³⁸ *Fehr v. First Americana Corp.*, 31 A.D.2d 967, 968, 299 N.Y.S.2d 214, 216-17 (2d Dep't 1969), *appeal dismissed*, 25 N.Y.2d 890, 251 N.E.2d 147, 304 N.Y.S.2d 8 (1969).

receiver may keep.³³⁹ Those rents have been severed from the underlying real estate. But A's receiver may collect rents going forward from t_5 .³⁴⁰

This was the holding of *S & H Building Materials Corp. v. European-American Bank & Trust Co.*,³⁴¹ with the proviso that the sheriff had levied T by serving T with the execution; no receiver was appointed. The *S&H* court found the sheriff's levy unproblematic, but as a statutory matter, service of the execution on T is a levy only if there is an "interest of the judgment debtor . . . in personal property" of the debtor.³⁴² The rent receivable is real property.³⁴³ Oddly, once the dollars are collected by the sheriff, the dollars are personal property as to which A's senior mortgage lien does not attach.³⁴⁴ Nevertheless,

³³⁹ An "assignment of rents" in which A purports to own collections without the intervention of a receiver is not permitted in New York. See *id.*, 31 A.D.2d at 968, 299 N.Y.S.2d at 217.

³⁴⁰ In *Fehr*, A was the senior mortgagee and B was the junior mortgagee. JC_1 docketed against D, followed by JC_2 . JC_2 was the first to obtain a receiver. JC_2 's receivership was "extended" to A—that is, instead of obtaining a new receiver, JC_2 's receiver was given a new boss in A. The receiver then sold the premises, which satisfied A's mortgage. The court ruled that JC_2 was senior to B as to rents actually collected. The dissent, however, thought that whatever the receiver held should be viewed as surplus from the sale itself, as to which B would have been senior. Indeed, had the receiver given the rents to A, such that A was paid, surplus proceeds would have existed, and B would have been entitled to them over JC_1 and JC_2 . The majority in *Fehr*, however, thought that the rent collections were not to be viewed as surplus funds at all. Once collected, the funds were personal property to which B had no right. See *id.*, 299 N.Y.S.2d at 217.

Also to be noted is the fact that JC_1 had a judicial lien senior to that of JC_2 . Yet JC_2 was the first to obtain a receiver and so won priority over JC_1 . Presumably, JC_1 could take back the premises from JC_2 by separately obtaining a receivership.

³⁴¹ 104 Misc. 2d 249, 428 N.Y.S.2d 140 (Sup. Ct. Suffolk County 1980).

³⁴² N.Y. C.P.L.R. 5232(a) (emphasis added).

³⁴³ In *Community Bank, National Ass'n v. Lyons (In re Lyons)*, 177 B.R. 767, 771 (Bankr. N.D.N.Y. 1994), a debtor and his non-debtor wife had rental income. The wife acquiesced to the debtor's expropriation of the rent. Meanwhile, JC had a judgment against the wife and claimed the right to garnish the tenants paying rent. The court ruled that rents were inherently not garnishable because they were real property.

³⁴⁴ In *Kissling v. Maidman*, A foreclosed on JD 's real property and had a deficit. A's receiver had some collected rents on hand. 103 Misc. 2d 44, 45, 425 N.Y.S.2d 469, 470 (Sup. Ct. N.Y. County. 1980). Two JCs who docketed before the receiver was appointed claimed priority to the funds. *Id.* The easy answer is that the receiver was a court officer in the employ of A, and the rents he held were A's funds. Confusingly, CPLR 5234(a) states that, "the proceeds of personal property . . . acquired by a receiver or a sheriff . . . shall be distributed to the judgment creditor and any excess shall be paid over to the judgment debtor." The *Kissling* court hinted that a JC who had served an execution on the sheriff would have been senior, but this hint should

at the moment of the levy, the uncollected rent receivable is not personal property.³⁴⁵

In *Glassman v. Hyder*,³⁴⁶ a sheriff, pursuant to a pre-judgment order of attachment, levied *T*'s obligation to pay rent for occupation of a New Mexico building. This was done by serving *T* (present and doing business in New York) with an order of attachment in New York. Judge Charles Breitel acknowledged that rent receivables are real property and, if located in New York, he endorsed the idea of a receivership as an outgrowth of a lien on the reversionary interest. But *T* was renting a New Mexico building. The rent receivable, therefore, could only be reached by encumbering the reversionary interest with a judicial lien in New Mexico.³⁴⁷ Obviously, the plaintiff did not want to travel to New Mexico; he wanted to bring a quasi in rem proceeding in New York.

Judge Breitel did not quite rule that rents were real estate and therefore not leviable. Rather, he ruled that rent receivables were *debts* owed by *T* to *D*. Confusingly, the CPLR distinguishes between personal property³⁴⁸ and debts,³⁴⁹ as if they are separate things. But, in New York, only debts certain to become due can be levied. A rent receivable is not certain to become due. Rather, it is a contingent obligation; *T* owes rent only if *T*'s quiet use and enjoyment of the premises continues. Therefore, the rent was an unleviable contingent debt.

be rejected. CPLR 5234(a)'s unstated premise is that *JCs* claiming a distribution from a receiver must have obtained the appointment of the receiver pursuant to CPLR 5228. If someone *else's* receiver has funds, a *JC* for whom the receiver was not appointed can only levy on the surplus after the receiver's client has been paid.

³⁴⁵ A levy of a rent receivable by execution is not valid, but what if, as in *S&H Building Materials*, a tenant actually pays the sheriff. In such a case, CPLR 5209 applies:

A person who, pursuant to an execution . . . pays . . . a sheriff or receiver, money . . . in which a judgment debtor has or will have an interest . . . is discharged from his obligation to the judgment debtor to the extent of the payment

Although the execution creates no lien on the rent receivable, the tenant is invited to pay anyway and, if he does, his rent obligation is deemed satisfied.

³⁴⁶ 23 N.Y.2d 354, 244 N.E.2d 259, 296 N.Y.S.2d 783 (1968).

³⁴⁷ *Glassman* therefore overrules *Ivor B. Clark Co. v. Hogan*, 296 F. Supp. 398 (S.D.N.Y. 1968), modified on other grounds, 296 F. Supp. 407 (S.D.N.Y. 1969), decided two months earlier, where a New York *JC* obtained a turnover order (and hence a personal property judicial lien) on rent receivables located in Georgia).

³⁴⁸ N.Y. C.P.L.R. 5201(b).

³⁴⁹ *Id.* 5201(a).

Later, the court in *ABKCO Industries, Inc. v. Apple Films, Inc.*,³⁵⁰ amplified the meaning of *Glassman*. The ABKCO court implied that the rent receivable in *Glassman* was both a debt under section 5201(a) and property under section 5201(b). As a debt, it could not be levied, because it was not certain to become due. As property, the rent receivable was usufructuary to New Mexico land and so was not located in New York. This remark implies that rent receivables located in New York are *real* property (as well as debts). Yet paper levies under section 5232(a) or section 6214(a) operate only if the debtor has *personal* property or debts *certain to become due*. The lesson here is that rent receivables in New York are not properly leviable. Nor can they be reached by turnover orders, which are also geared to personal property only.³⁵¹

As if this were not peculiar enough, we must add a strange and no doubt absurd distinction. Real property law distinguishes between the forward-looking obligation of the covenant running with the land from the liability for breach of the covenant. The future obligation is purely real property—the rent receivable. But the breach of a past obligation is a *chose in action*³⁵²—personal property of the debtor that can be levied, because it has already become due. For example, in *Glassman*, *T* had to pay rent a month in advance. *T* was served with the order of attachment on December 21, 1965. At the time of the levy, *T* was entirely paid up on back rent. No more rent was due until January 1, 1966.³⁵³ Therefore, at the time of the levy, the rent receivable was real property, or it was contingent debt, per the *Glassman* majority.³⁵⁴

³⁵⁰ 39 N.Y.2d 670, 350 N.E.2d 899, 385 N.Y.S.2d 511 (1976).

³⁵¹ N.Y. C.P.L.R. 5225(b); *Neshewat v. Salem*, 365 F. Supp. 2d 508, 525–26 (S.D.N.Y. 2005); *Oil City Petroleum Co. v. Fabac Realty Corp.*, 70 A.D.2d 859, 418 N.Y.S.2d 51 (1st Dep’t 1979), *aff’d*, 50 N.Y.2d 853, 407 N.E.2d 1334, 430 N.Y.S.2d 38 (1980).

³⁵² *Mygatt v. Coe*, 124 N.Y. 212, 218, 26 N.E. 611, 612 (1891); *see Duvall v. Craig*, 15 U.S. 45, 62 (1817).

³⁵³ *Glassman v. Hyder*, 23 N.Y.2d 354, 358, 244 N.E.2d 259, 260, 296 N.Y.S.2d 783, 785 (1968). Eventually, the court dissolved the order of attachment and the sheriff returned these funds to *D* in New Mexico. *Id.*, 244 N.E.2d at 260, 296 N.Y.S.2d at 785.

³⁵⁴ Judge Keating, in dissent, thought this contingency so remote that January rent should have been deemed a debt certain to become due. *Id.* at 367, 244 N.E.2d at 265, 296 N.Y.S.2d at 793 (Keating, J., dissenting).

Suppose, however, the sheriff levied on January 2 at a time when *T* had not yet paid the rent. As of January 1, *T* owed rent certainly and it was due. So, on the reasoning of *Glassman*, the rent receivable had become a chose in action. This chose in action was both *D*'s personal property and a debt that has certainly become due. As such, it was fully leviable under the first sentence of CPLR 6214.

A levy by service of an order of attachment upon a person other than the defendant is effective only if, at the time of service, such person owes a debt to the defendant or such person is in the possession or custody of property in which such person knows or has reason to believe the defendant has an interest³⁵⁵

Since rent on January 3 was certainly due, the levy was valid. And given that this first sentence of section 6214(a) is met, the second sentence now takes effect:

[A]ll debts of such a person . . . then due and thereafter coming due to the defendant, shall be subject to the levy.³⁵⁶

This means that *T* would have had an ongoing duty to pay rent to the sheriff as rent accrued after January 2 (our hypothetical date of levy). For instance, rent in February, March, etc., was payable to the sheriff (not the landlord) until the maximum amount named in the order of attachment was fully secured.

This was the conclusion of the court in *Tenzer, Greenblatt, Fallon & Kaplan v. Abbruzzese*.³⁵⁷ Because *some* back rent was due and owing at the time of the levy, *all* rent in the future was levied. The judgment creditor in *Tenzer* therefore received years of rent that accrued after the initial valid levy.³⁵⁸

³⁵⁵ N.Y. C.P.L.R. 6214(b); see also *id.* 5232(a) ("A levy by service of the execution is effective only if, at the time of service, the person served owes a debt to the judgment debtor . . .").

³⁵⁶ *Id.* 6214(b); see also *id.* 5232(a) ("[A]ll debts of such a person . . . then due or thereafter coming due to the judgment debtor . . . shall be subject to the levy.").

³⁵⁷ 57 Misc. 2d 783, 293 N.Y.S.2d 634 (Sup. Ct. Queens County 1968).

³⁵⁸ In contrast, where a rent receivable has ripened into a chose in action and where a receiver displaces the mortgagee before the mortgagee has actually collected, the mortgagee's receiver succeeds both to the rent receivable *and* to the chose in action. See *N.Y. Life Ins. Co. v. Fulton Dev. Corp.*, 265 N.Y. 348, 353, 193 N.E. 169, 172 (1934). *Fulton* therefore contradicts the premise that an obligation arising from a running covenant but which is past due is personal property. Otherwise, the mortgage lien on real property could not attach to the landlord's chose in action.

But can this conclusion be vindicated in light of the *fifth* sentence of section 6214? That sentence provides:

Until such payment . . . or until the expiration of ninety days after the service of the order of attachment upon him, or of such further time as is provided by any subsequent order of the court served upon him, whichever event first occurs, the garnishee is forbidden to . . . pay over or otherwise dispose of any such debt, to any person other than the sheriff, except upon direction of the sheriff or pursuant to an order of the court.³⁵⁹

Suppose *T*, in *Glasser* was garnished on January 2 and *T* paid the sheriff on January 3. The second sentence says that, when February rent becomes due, *T* must pay it to the sheriff. But the inscrutable fifth sentence states that, after January 3, *T* is *no longer forbidden* to pay the debt to *D*. How these sentences are supposed to interact is a mystery. The court in *Tenzer*, however, assumed that the levy survives past January 3 to pick up the rent obligation in February, March and beyond.³⁶⁰

The sheriff's levy of debt certainly due picks up contingent debt that becomes vested during the life of the levy. But it is otherwise if *JC* attempts to obtain a turnover order against *T*. Turnover orders are competent to create a lien on debts³⁶¹ or on personal property.³⁶² Therefore, a turnover can effectively bind *T* to pay rent *past due*, but future debt is unencumbered by any given turnover order.³⁶³

There is one last possibility for obtaining the rents directly through execution. Perhaps rent is income within the meaning of CPLR 5231. Section 5231 governs income executions.³⁶⁴ This is the means by which creditors garnish wages. But section 5231 is

³⁵⁹ N.Y. C.P.L.R. 6214(b); see also *id.* 5232(a) ("At the expiration of ninety days after a levy is made by service of the execution, or of such further time as the court, upon motion . . . has provided, the levy shall be void except as to . . . debts . . . paid to the sheriff . . . or as to which a proceeding under sections 5225 or 5227 has been brought.").

³⁶⁰ It should be noted that the fifth sentence has the familiar wild card, "except upon direction of the sheriff or pursuant to an order of the court." *Id.* 6214(b). So perhaps the sheriff or the court could extend the injunctive effect of the levy past the point at which *T* pays. But another interpretation of this discretion is that the sheriff or court may *shorten* the injunctive effect but may not lengthen it.

³⁶¹ N.Y. C.P.L.R. 5227.

³⁶² *Id.* 5225.

³⁶³ *Neshewat v. Salem*, 365 F. Supp. 2d 508, 526 (S.D.N.Y. 2005).

³⁶⁴ An income execution must set forth the amount of income to be received and how much of it must be paid over to the sheriff, plus various other items not required in an ordinary execution. N.Y. C.P.L.R. 5231(a).

not limited to wages; it applies "[w]here a judgment debtor is receiving or will receive money from any source."³⁶⁵ Because section 5231 involves wages, it is encrusted with all sorts of restrictions. In particular, the sheriff must first serve *JD* with the income execution, to give *JD* the opportunity to avoid garnishment by paying the sheriff directly.³⁶⁶ If *JD* does not pay, the sheriff then garnishes the employer. Furthermore, the levy extends only to ten percent of income.³⁶⁷ In New York, ninety percent of wages are exempt from execution.³⁶⁸ The income execution must be served on the sheriff of the county where *JD* resides, or, if a non-resident, where *JD* is employed.³⁶⁹

Can wage garnishments levy the rent *T* owes her landlord? This possibility was considered and not entirely rejected in *Glassman*. Judge Breitel doubted whether income could be levied under a pre-judgment order of attachment, since CPLR 6202 makes only debt or property "as provided in section 5201" subject to attachment.³⁷⁰ "Income" was conceived to be a third thing that could be levied by an income execution pursuant to CPLR 5231, Judge Breitel also noted that income executions must in any case be delivered to the debtor.³⁷¹ Because this had not been done, the plaintiff could not rely on a levy of income in *Glassman*.³⁷²

To summarize, *JC* can clearly get rent on New York real property by docketing a judgment in the county where the rent receivable is located and by obtaining the appointment of a receiver who "dispossesses" *JD* and takes over the right to collect rents. Whether rent can be levied pursuant to an ordinary execution, however, is subject to the caprice of whether, at the time of the levy, *T* owes back rent (a chose in action) or future rent (not *D*'s *personal* property). There is also the somewhat loopy possibility that *JC* can obtain ten percent of the rents pursuant to an income execution. These absurdities result from the fact that only personal property and debts certain to become

³⁶⁵ *Id.* 5231(b).

³⁶⁶ *Id.* 5231(d).

³⁶⁷ *Id.* 5231(b).

³⁶⁸ *Id.* 5205(d)(2).

³⁶⁹ *Id.* 5231(b).

³⁷⁰ *Id.* 6202; *Glassman v. Hyder*, 23 N.Y.2d 354, 360, 244 N.E.2d 259, 261, 296 N.Y.S.2d 783, 787-88 (1968).

³⁷¹ N.Y. C.P.L.R. 5231(d).

³⁷² 23 N.Y.2d at 360-61, 244 N.E.2d at 262, 296 N.Y.S.2d at 788.

due may be levied by service of the execution. As a result, rent receivables are immune from levy under section 5232(a), though choses in action are not.

VII. AFTER-ACQUIRED PROPERTY

Much of the above discussion presupposes that a debtor owns real property at the time a judgment is docketed. It is very possible that the debtor will acquire property after judgments are docketed. In such a case, all the liens attach to the after-acquired property all at the same time.³⁷³ None is prior in time to any other. By New York case law, these liens are deemed to share pro rata in the property.³⁷⁴

The leading case for this proposition is *Hulbert v. Hulbert*.³⁷⁵ The facts of this case, however, are rather different from the proposition for which the case is cited.

Hulbert presented the following facts³⁷⁶:

t_1 : JC_1 docketed, but JD has no real property.

t_2 : JC_2 docketed.

t_3 : JC_2 docketed a second, separate judgment.

t_4 : JD inherits a one-third cotenancy in real property.

t_5 : JC_1 delivers an execution to the sheriff. At the execution sale, X is the buyer.

t_6 : JD 's cotenants move for and obtain a partition sale whereby a fee simple estate is sold to Y .

In *Hulbert*, the court awarded JD 's one-third share to X and JC_2 on a pro rata basis.³⁷⁷ Accordingly, the case stands for the fact that when JC_1 and JC_2 compete for after-acquired real property of JD , they share pro rata.³⁷⁸

A mystery in the case is the effect of the execution sale at t_5 on JC_2 . Did not X buy JD 's inheritance free and clear of JC_2 's lien? Here was what the *Hulbert* court had to say on the matter:

³⁷³ Bankruptcy discharge interferes with this conclusion. If the discharge is granted before the debtor obtains real property, the judgment is destroyed and can create no after-acquired property lien on the debtor's acquisition. *Bank of N.Y. v. Nies*, 96 A.D.2d 166, 172, 468 N.Y.S.2d 278, 282 (4th Dep't 1983).

³⁷⁴ Other states follow various other priority solutions. See generally David Gray Carlson, *Simultaneous Attachment of Liens on After-Acquired Property*, 6 CARDOZO L. REV. 505 (1985).

³⁷⁵ 216 N.Y. 430, 111 N.E. 70 (1916).

³⁷⁶ *Id.* at 432, 111 N.E. at 70.

³⁷⁷ *Id.* at 442, 111 N.E. at 74.

³⁷⁸ *Id.* at 441-42, 111 N.E. at 73-74.

[T]he liens of the three judgments attached simultaneously to the property of [JD] upon his acquisition of the interest derived from his father. By virtue of the statute they were at that time equal liens entitled to share pro rata in the proceeds of the debtor's property. Such being the case, how can it be held that the issuing of the execution and the advertising by the sheriff—acts which would be an idle ceremony—should give a preference to the creditor? Once a lien is acquired it is a right which cannot be lost by the performance of an unnecessary act by another creditor. With as much reason could it be held that as between two mortgagees holding mortgages of equal rank the one who showed the greatest diligence in commencing an action of foreclosure should acquire a preference over the other. Under the terms of the statute the judgments of [JC₂] became liens on the real property of [JD] of equal rank with the lien of the judgment of [JC₁]. The lien of these judgments of [JC₂], having attached, did not forfeit their position of equality and become subordinate to a lien of equal rank, merely because its owner did not do *a useless thing*. . . . The diligence of a junior judgment creditor could not affect the lien of a senior judgment creditor, and, if it could not affect the lien of a senior judgment creditor, it cannot affect the lien of equal rank. The principle that equity favors the diligent has no application where one creditor displays his diligence in the doing of useless and unnecessary things. The liens of the three judgments attached when [JD] acquired the property. The issuing of an execution upon one of the judgments could not affect the relative rank of the liens as between themselves.³⁷⁹

A careful reading of this passage reveals that the reason JC₂'s liens did not disappear in JC₁'s execution sale is that JC₁ had no power to foreclose simultaneously created liens. For this reason, the court refers to JC₁'s execution as "a useless thing."³⁸⁰

So if X did not buy free and clear of JC₁ and JC₂, what did X buy? In the sale, X bought JC₁'s lien and JD's equity.³⁸¹ Because JC₁'s lien and JC₂'s two liens together exceeded the value of JD's one-third interest, JD's equity did not figure in the distribution of the partition sale.³⁸² In effect, X had only JC₁'s docketing lien to

³⁷⁹ *Id.* at 441, 111 N.E. at 73 (emphasis added).

³⁸⁰ *Id.* at 440–41, 111 N.E. at 73.

³⁸¹ *See id.*

³⁸² *Id.* at 432–33, 111 N.E. at 70.

assert against JC_2 . The two liens of JC_2 were held to be equal in time and pro rata in share.³⁸³

How would this case be decided under CPLR 5203(a)? X would have taken the entire distribution from the partition sale. To be sure, JC_1 and JC_2 were equal until the execution sale. According to section 5203(a): "No transfer of an interest of the judgment debtor in real property . . . is effective against the judgment creditor . . . from the time of the docketing of the judgment with the clerk of the county in which the property is located" ³⁸⁴ Under this provision, JC_1 docketed first, and so no transfer to JC_2 is good against him. The trouble is JC_2 has the same argument. JC_1 also was a transferee (at t_3) after JC_2 docketed, and so JC_1 's lien is no good against JC_2 . Neither side can look to section 5203(a) for priority.

X , however, stands on different ground. The preamble to section 5203(a) is subject to an exception by section 5203(a)(2), which states that JC_2 loses as to "a transfer to a purchaser for value at a judicial sale, which shall include an execution sale." By virtue of this exception, JC_2 is foreclosable by JC_1 (and vice versa). In short, *Hulbert's* holding on foreclosability has been overruled by enactment of the CPLR, although its holding on pro rata sharing lives on.

VIII. JUDICIAL LIENS AND FRAUDULENT CONVEYANCES

Suppose JD fraudulently conveys real property to X . JC then docket a judgment against JD . Does JC have a lien on X 's property? The proper answer should be no.³⁸⁵ CPLR 5203(a) states that docketing creates a lien on "an interest of *the judgment debtor* in real property."³⁸⁶ And, once she conveys it away, JD has *no* interest in the property.³⁸⁷ To be sure, X holds the property in trust for creditors of JD . But JD has no property interest in what JD has conveyed to X .

That JD has no property left after a fraudulent conveyance was recognized by the Court of Appeals in *Bostwick v. Menck*,³⁸⁸

³⁸³ *Id.* at 440, 111 N.E. at 73.

³⁸⁴ N.Y. C.P.L.R. 5203(a) (McKinney 2008).

³⁸⁵ *See id.* According to the statute, a docketing creates a lien only against JD , not a transferee of JD 's property.

³⁸⁶ *Id.* (emphasis added).

³⁸⁷ *See infra* note 424 and accompanying text.

³⁸⁸ 40 N.Y. 383, 385 (1869) (a receiver in a fraudulent conveyance action "acquires no right to the property by succession to the rights of the debtor, for the

where *JD* conveyed some sort of property, personal or real, to *X*.³⁸⁹ *JC* then obtained the appointment of a receiver, who brought a fraudulent conveyance action against *X*. The exact issue in the case was whether the receiver should recover only enough property to satisfy *JC*'s \$200 judgment or whether the receiver could compel *X* to surrender all of the fraudulently conveyed property worth \$15,000.³⁹⁰ The court ruled that *X* would be excused if he turned over \$200 in property.³⁹¹ In the course of so ruling, the court said that the receiver

acquires no right to the property by succession to the rights of the debtor, for the reason that the transfer is valid as against the debtor, and cannot be set aside by him as the debtor's successor [T]he fraudulent transferee of property acquires a good title thereto as against the debtor, and all other persons except the creditors of the transferrer [T]he right of the receiver representing the creditors . . . is no greater than that of the creditors. What, then, are the legal and equitable rights of a creditor as to property fraudulently transferred? Manifestly only to treat as void and set aside such transfer, so far as shall be necessary to satisfy his debt and costs. . . . When his debt and costs are paid, the transfer is valid as to him as to other persons.³⁹²

From this principle it should follow that docketing against *JD* cannot mean *JC* has a lien against *X*'s property.³⁹³

By way of good example, *Luhrs v. Hancock*³⁹⁴ presented the following set of facts:

- t*₁: *JD* fraudulently conveys Arizona real property to *X*.
- t*₂: *JC* docketes against *JD*.
- t*₃: *X* conveys a mortgage to *B*. *B* is a bona fide purchaser.
- t*₄: *JC* initiates an execution sale, where *Y* is the buyer.
- t*₅: *B* initiates a foreclosure sale where *Z* is the buyer.
- t*₆: *Y* sues to eject *Z*.

reason that the transfer is valid against the debtor, and cannot be set aside by him as the debtor's successor").

³⁸⁹ *Id.* at 384-85.

³⁹⁰ *Id.* at 383-84.

³⁹¹ *Id.* at 385-86.

³⁹² *Id.*; accord *McDonald v. McDonald*, 17 N.Y.S. 230, 232 (N.Y. Sup. Ct. Gen. T. 3d Dep't 1891) (a *JD* "has no interest in the land which she fraudulently conveyed").

³⁹³ See *Doster v. Manistee Nat'l Bank*, 55 S.W. 137 (Ark. 1900). This ancient opinion is conspicuously well reasoned and deserves to be followed in New York.

³⁹⁴ 181 U.S. 567, 568-69 (1901).

The *Luhrs* court held that *Z* had better title than *Y*.³⁹⁵ Under Arizona law, *JC* never had a lien on *X*'s property.³⁹⁶ Therefore, *X* could validly mortgage to *B*, the bona fide mortgagee. And *Z* could take good title under the shelter of *B*'s status as a bona fide purchaser.

Surprisingly, New York case law strongly indicates that *JC* does have a lien against *X*'s property, even before *JC*₁ moves to set the fraudulent conveyance aside. This rule is entirely contrary to the logic of fraudulent conveyance law, which holds that, at the time of docketing, *JD* had already conveyed away the property. Having no property, there is nothing to which *JC*'s lien could attach.

A leading authority in New York for its lamentable rule is *White's Bank of Buffalo v. Farthing*.³⁹⁷ In *White's Bank*, *JD* conveyed to *X* before any judgments were docketed.³⁹⁸ *JCS*₁₋₃ then docketed in sequence.³⁹⁹ *JC*₂ sought to execute on *X*'s property without making *JC*₁ a party.⁴⁰⁰ The court properly held that *JC*₁ was not a necessary party, a conclusion that would be correct if *JC*₁ had no lien on *X*'s property.⁴⁰¹ Inconsistently, however, the *White's Bank* court remarked:

The several judgments became liens on lands fraudulently conveyed by [*JD*] in the order of their docketing, and they could have been sold on executions issued on the judgments.^[402] [*JC*₂], however, elected to bring its action to remove the alleged fraudulent obstruction created by the conveyances. If it succeeds in establishing the fraud, it will be entitled to a judgment setting aside the conveyances simply, in which case it can proceed to enforce its judgment by a sale of the land on execution, unembarrassed by the cloud created; or the court may proceed further, and compel the fraudulent grantees to

³⁹⁵ *Id.* at 570.

³⁹⁶ *Accord In re Estes*, 3 F. 134, 141 (D. Or. 1880), *aff'd*, 5 F. 60 (C.C.D. Or. 1880).

³⁹⁷ 101 N.Y. 344, 4 N.E. 734 (1886).

³⁹⁸ *Id.* at 346, 4 N.E. at 734.

³⁹⁹ *Id.* at 347, 4 N.E. at 734.

⁴⁰⁰ *Id.*, 4 N.E. at 734-35.

⁴⁰¹ *Id.* at 347-48, 4 N.E. at 734-35.

⁴⁰² *But see Nat'l Tradesmen's Bank v. Wetmore*, 124 N.Y. 241, 249, 26 N.E. 548, 549 (2d Div. 1891) (requiring a judgment creditor to bring an equitable action to avoid, with a showing that the legal remedy of execution was inadequate). *Wetmore's* insistence upon an equitable proceeding is completely inconsistent with the premise that *JC* has a lien on fraudulently conveyed land upon docketing against the *JD*.

convey the lands to a receiver, to be sold to satisfy the plaintiff's judgment.

The judgments in favor of the other banks will in no way be affected, whichever form the judgment in this action may take. If it simply sets aside the fraudulent conveyances, the land will remain charged with the liens of the several judgments in the order of their docketing, and the proceedings to enforce them will be regulated by the statute. If it goes further, and appoints a receiver, and directs a conveyance to him, a purchaser under the receiver's sale will take title as of the time of the debtor's conveyance to the receiver, subject, however, to the judgment in favor of the banks other than [*JC*₂]. The result of [*JC*₂'s] action will not, therefore, affect the lien of the judgments in favor of the other banks who seek to intervene in this action.

... According to the rule established in this state judgment creditors holding distinct and several judgments may unite in an action to set aside a conveyance by the common debtor, made in fraud of their rights as creditors. This is a convenient rule, but it is not a rule of obligation, but one conferring authority only. It has never been held that all judgment creditors so situated were necessary parties to such an action. . . . The rights of the creditor not made a party will not be prejudiced by the judgment in that action. A judgment creditor has no title to the land of the judgment debtor, but a lien only, which may, by subsequent proceedings, become the foundation of title; nor has he any interest in the subject-matter of the action brought by another judgment creditor, within the meaning of the section. He may have an interest which will be subserved by having the conveyance set aside. But he will not be concluded by a denial of that relief in the action of the other creditor, and, whatever the result of that action may be, his rights and remedies remain as before.⁴⁰³

This long passage seems to be saying that, even though it was the first to commence a supplementary proceeding against *X*, *JC*₂ had a lien junior to that of *JC*₁ and that *JC*₁ could not be foreclosed in *JC*₂'s action.⁴⁰⁴ What the fraudulent conveyance proceeding against *X* achieves, according to the *White's Bank* court, is a declaration that *JD* once again owns the property, and

⁴⁰³ 101 N.Y. at 346–48, 4 N.E. 734–35 (emphasis added) (citations omitted).

⁴⁰⁴ The modern CPLR would at least make *JC*₁ foreclosable. N.Y. C.P.L.R. 5203(a)(2) (McKinney 2008). But *JC*₁ would have priority to the proceeds of an execution sale. *Id.* 5236(g).

the docketing liens can now be enforced without the worry that the conveyance to *X* might later be found unfraudulent.⁴⁰⁵

In *Chautauque County Bank v. Risley*,⁴⁰⁶ however, *JC*₁ and *JC*₂ both docketed against *JD* after *JD* fraudulently conveyed land to *X*. *JC*₁ was the first to bring an equitable action against *X*. The *Chautauque County Bank* court ruled that *JC*₁ waived the lien by proceeding in equity, thereby allowing *JC*₂'s lien to gain priority.⁴⁰⁷ This egregious holding, still thought to be good law in 1929,⁴⁰⁸ makes it risky for *JC*₁ to proceed in equity, in lieu of simply serving an execution on the sheriff.

The regrettable New York position effectively denies to a bona fide purchaser protection from fraudulent conveyance liability. According to New York Debtor and Creditor Law 278(1):

Where a conveyance . . . is fraudulent as to a creditor, such creditor, when his claim has matured, may, as against any person *except a purchaser for fair consideration without knowledge of the fraud* at the time of the purchase . . .

a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or

⁴⁰⁵ For a similar holding, see *Hillyer v. LeRoy*, 179 N.Y. 369, 375, 72 N.E. 237, 238 (1904), where *JD* conveyed to *X* and *JC*₁ docketed against *JD* thereafter. Two years later, *JD* filed for bankruptcy and received a discharge. Discharges have the effect of nullifying judgments in personam but leaving judicial liens intact. See 11 U.S.C. § 524(a) (2000 & Supp. V 2005). Thereafter, *JC*₁ commenced an action against *X* to set aside the fraudulent conveyance. *X* claimed that *JC*₁'s judgment was discharged, but the court ruled that *JC*₁ had a lien on *X*'s property from the time *JC*₁ docketed against *JD*.

In *Wilkinson v. Paddock*, *JD* had granted a mortgage to *A*. *JD* then fraudulently conveyed the equity to *X*. 11 N.Y.S. 442, 443 (N.Y. Sup. Ct. Gen. T. 4th Dep't 1890), *aff'd mem.*, 125 N.Y. 748, 27 N.E. 407 (1891). First *JC*₁ and then *JC*₂ docketed judgments against *JD*. *JC*₂ successfully brought an action against *X* declaring *X*'s title to be based on fraudulent conveyance. *A* then foreclosed everybody and a surplus resulted. *JC*₁ was held senior to *JC*₂, even though *JC*₁ never sought to have *X*'s conveyance set aside.

In *North Fork Bank v. Schmidt*, the court was prepared to give *JC*₁ priority over fraudulently conveyed assets, even though *JC*₂ was the first to commence a proceeding against *X* to recover the fraudulent conveyance. The court remanded because *JC*₁ had not proved that the conveyance was fraudulent as to it (while *JC*₂ had made such a showing). 265 A.D.2d 466, 468, 697 N.Y.S.2d 106, 108 (2d Dep't 1999).

⁴⁰⁶ 19 N.Y. 369, 372 (1859).

⁴⁰⁷ *Id.* at 375.

⁴⁰⁸ Note, *Priorities Among Judgment Creditors Pursuing Statutory and Equitable Remedies in New York*, 29 COLUM. L. REV. 504, 508 (1929).

b. Disregard the conveyance and attach or levy execution upon the property conveyed.⁴⁰⁹

If indeed *JC* has a judicial lien against *X*'s property by docketing against *JD*, then bona fide purchasers for value from *X* takes subject to it.⁴¹⁰ There is no bona fide purchaser protection against a docketing lien in New York.⁴¹¹ And if *X*'s purchaser takes free of *JC*₁'s fraudulent conveyance right, then perforce *JC*₁ has no lien.⁴¹²

The New York rule also allows *X* to hide behind *JC*₁'s inactivity in avoiding liability to *JC*₂. "[T]he effect would be to ignore that old and excellent maxim of equity, *Vigilantibus non dormientibus, æquitas subvenit*, and to declare in favor of those merely prior in time, although ever so unequal in diligence."⁴¹³ Why should *X* escape liability to *JC*₂ just because *JC*₁'s judgment makes it bootless for *JC*₂ to proceed?

The New York position plays havoc with the statute of limitations. The life of docketing lien approaches ten years.⁴¹⁴ The statute of limitations in New York for avoidance of a fraudulent conveyance is but six years.⁴¹⁵ If *JC*₁ really has a lien on *X*'s real estate, then *X* cannot cite the six-year statute of limitations. Rather, *JC*'s lien can be enforced for at least ten

⁴⁰⁹ N.Y. DEBT. & CRED. LAW § 278(1) (McKinney 2008) (emphasis added).

⁴¹⁰ In *Feuer v. Schaller*, the court asserted that where *JD* conveys to *X* and *JC*₁ docket against *JD*, *JC*₁ has a lien against *X*. 115 Misc. 229, 230–31, 187 N.Y.S. 530, 531–32 (Sup. Ct. Kings County 1921). But, prior to *JC*₁'s docketing, *X* had conveyed to *Y*, a bona fide purchaser. Therefore, *JC*₁'s lien did not attach against *Y*'s property. Had *Y* purchased after *JC*₁'s docketing presumably *Y*'s property would have been encumbered by *JC*₁'s lien, in spite of *Y*'s bona fide purchaser status.

⁴¹¹ See N.Y. DEBT. & CRED. LAW § 271(1).

⁴¹² In *Corbin v. Litke*, 105 Misc. 2d 94, 431 N.Y.S.2d 800 (Sup. Ct. Suffolk County 1990), the court assumed that the proper fraudulent conveyance remedy was an injunction forcing *X* to convey the property back to *JD*, so that *JC*₁'s lien could attach. On its own merits, this is unfortunate. Where *JC*₁'s judgment is for \$100 and the property is worth more than that, the conveyance back to *JD* means that *JD* gets the surplus, which is not appropriate. Be that as it may, the remedy assumes that *JC*₁ does not *already* have a lien on *X*'s property.

⁴¹³ *Doster v. Manistee Nat'l Bank*, 55 S.W. 137, 138 (Ark. 1900) (internal quotation marks omitted).

⁴¹⁴ See *supra* text accompanying notes 51–57.

⁴¹⁵ N.Y. C.P.L.R. 213(1) (McKinney 2008); see also *Carey v. Crescenzi*, 923 F.2d 18, 20 (2d Cir. 1991). When the fraudulent transfer is an intentional fraud, then *C*₁ has six years or two years after discovery, whichever lasts longer. *Wall St. Assocs. v. Brodsky*, 257 A.D.2d 526, 530, 684 N.Y.S.2d 244, 248 (1st Dep't 1999).

years from the judgment-roll⁴¹⁶ and even indefinitely, if *JC* takes care to preserve the lien.⁴¹⁷ This difficulty is illustrated by *Smith v. Reid*,⁴¹⁸ where *JD* fraudulently conveyed New York real property to *X*. *JC* then docketed against *JD* but made no effective move against *X* or *X*'s successors.⁴¹⁹ Thereafter, the statute of limitations for fraudulent conveyance avoidance lapsed.⁴²⁰ After the lapse, *JC* held an execution sale, where *Y* was the buyer.⁴²¹ *Y* was able to quiet title against *X*'s successors.⁴²² Properly, all that *Y* should have taken from the execution sale was *JC*'s right to have the fraudulent conveyance set aside. But against this right *X*'s successors should have had the benefit of the six-year statute of limitations.⁴²³

The New York position is based on a metaphorical confusion which states that, when *JD* makes a fraudulent conveyance, *JD* makes no conveyance at all. The conveyance is said to be *void*. In truth, the conveyance is *void as to creditors* but *otherwise valid*.⁴²⁴ "Metaphors in law," Judge Cardozo once warned, "are to be narrowly watched, for starting as devices to liberate thought,

⁴¹⁶ 1 GARRARD GLENN, FRAUDULENT CONVEYANCES AND PREFERENCES § 72, at 115 (2d ed. 1940).

⁴¹⁷ This can be done by bringing an action on the judgment in the ninth year of the life of the docketing lien. See *supra* text accompanying notes 120–121.

⁴¹⁸ 134 N.Y. 568, 31 N.E. 1082 (1892).

⁴¹⁹ See *id.* at 568, 31 N.E. at 1083.

⁴²⁰ See *id.* at 577–78, 31 N.E. at 1085.

⁴²¹ See *id.* at 570, 31 N.E. at 1083.

⁴²² See *id.* at 578, 31 N.E. at 1086. In *Smith*, *Y* actually went into possession. *Id.* at 577, 31 N.E. at 1085. Thereafter, *X* sold to *Z*, who had no knowledge of *Y*. See *id.* at 570, 31 N.E. at 1083. The court held that *Z* was on inquiry notice of *Y*'s rights and therefore could not be a bona fide purchaser. *Id.* at 577, 31 N.E. at 1085. Yet, even if *Z* was a bona fide purchaser, *Y* bought free and clear of *X*, on the court's own logic. Therefore, *X* had nothing to convey to *Z*, and bona fide status was irrelevant.

⁴²³ The issue of statute of limitations was present in *Domestic & Foreign Discount Corp. v. Beuerlein*. 54 N.Y.S.2d 548 (Sup. Ct. Monroe County 1944). In this case, *JD* conveyed property to *X* in 1931. *Id.* at 549. *JC* docketed a judgment against *JD* in 1932. *Id.* In the final days of the docketing lien, *JC* served an execution on the sheriff. *Id.* The sheriff held the sale after the docketing lien was dead, which the court held proper. See *id.* at 549–50. At the sale, *JC* was the buyer. *Id.* *JC* was treated as if it was not a bona fide purchaser (which it probably was). Nevertheless, if *JC* had a lien on *X*'s property, *JC* should have successfully bought *X*'s interest. The court, however, held that the statute of limitations on fraudulent conveyance actions against *X* had run. *Id.* at 550. Accordingly, the court must have believed that *JC* never had a lien on *X*'s property.

⁴²⁴ See David Gray Carlson, *The Logical Structure of Fraudulent Transfers and Equitable Subordination*, 45 WM. & MARY L. REV. 157, 170–71 (2003).

they end often by enslaving it."⁴²⁵ In the realm of fraudulently conveyed real property, New York courts are entirely enslaved by the metaphor of voidness. As an astute Arkansas chancellor wrote in *Doster v. Manistee National Bank*⁴²⁶ over a century ago: "Nor do courts of law annul and set aside fraudulent conveyances. Some process, after judgment at law is rendered, is necessary in order to fix and secure a lien upon property that has been fraudulently conveyed, and to uncover it for the judgment creditor."⁴²⁷

New York Debtor and Creditor Law 278(1) does not say that *JD*'s conveyance to *X* is void. It says a creditor may have the conveyance set aside to a certain extent—to the extent of *JC*'s judgment.⁴²⁸ Section 278(1) goes on to say that *JC* can disregard the conveyance and levy.⁴²⁹ But surely this means levying against *X*, not against *JD*. A levy against *X* does not require us to believe that *JC* already has a lien on *X*'s property. Indeed, in New York *JC*'s docketing lien against *JD* precludes levying under section 5235 altogether.⁴³⁰ In any case, CPLR 5235, which governs levy against real estate, authorizes a levy only "upon any interest of the judgment debtor in real property."⁴³¹ Where *JD* has made a fraudulent conveyance, *JD* has no interest remaining.⁴³² And, until *JC* sues *X*, *X* is no judgment debtor.

The bad consequence of these holdings is on display in some modern bankruptcy cases. In *Mendelsohn v. Thaler (In re Faraldi)*,⁴³³ *JD* made a fraudulent conveyance to *X*, *JC* docketed against *JD*, and *JD* filed for bankruptcy. Because *JD* had made a fraudulent conveyance, the trustee recovered *X*'s property and brought it into the bankruptcy estate.⁴³⁴ The court ruled, however, that *JC* had a valid judicial lien on *X*'s former property, because that property never ceased being *JD*'s property, and *JC*'s

⁴²⁵ *Berkey v. Third Ave. Ry. Co.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926).

⁴²⁶ 55 S.W. 137 (Ark. 1900).

⁴²⁷ *Id.* at 138.

⁴²⁸ N.Y. DEBT. & CRED. LAW § 278(1)(a) (McKinney 2008).

⁴²⁹ *Id.* § 278(1)(b).

⁴³⁰ See *supra* text accompanying notes 100–103.

⁴³¹ N.Y. C.P.L.R. 5235 (emphasis added).

⁴³² Of course, where *JD* conveys less than everything—a mortgage, for example—*JD* validly retains the equity to which a docketing lien could attach.

⁴³³ 286 B.R. 498 (Bankr. E.D.N.Y. 2002).

⁴³⁴ See *id.* at 503.

docketing against *JD* was a docketing against *X*.⁴³⁵ The result can only be explained by the metaphorical confusion that insists that a fraudulent conveyance is no conveyance.

Similarly, in *Lawson v. Liberty National Bank & Trust Co.*,⁴³⁶ *JD* fraudulently conveyed property to *X*. *JC* docketed against *JD* outside the preference period.⁴³⁷ Just before bankruptcy, *X* conveyed the property back to *JD*.⁴³⁸ Properly speaking, *JC*'s lien arose when *JD* re-acquired the property. Accordingly, *JC*'s lien should have been condemned as a voidable preference. The *Lawson* court, however, reversed the bankruptcy court and found that *JC*'s docketing lien arose prior to the preference period.⁴³⁹

A difficult bankruptcy case where these principles figure is *Wallach v. Brosnahan (In re Brosnahan)*,⁴⁴⁰ which we visited earlier with respect to the priority of discretionary future advances by a mortgagee against an intervening *JC*.⁴⁴¹ In *Brosnahan*, *JD* conveyed a mortgage to *A* on the eve of *JC*'s docketing lien.⁴⁴² *JD* then filed for bankruptcy. *A* sought to have the automatic stay lifted, but the bankruptcy court denied the motion because the trustee had a valid fraudulent conveyance cause of action against *A*.⁴⁴³ That is to say, *A* had advanced funds to *JD* knowing that *JD* was insolvent. The bankruptcy trustee is in for surprise, on the above principles of New York law. If cases like *Faraldi* are correct, then *JC* has a valid judgment lien on *A*'s mortgage. Anything the trustee recovers from *A* by virtue of his

⁴³⁵ See *id.* For a similar holding under Texas law, see *Cullen Center Bank & Trust v. Hensley (In re Criswell)*, 102 F.3d 1411 (5th Cir. 1997). In this case *JD* made a fraudulent conveyance to *X*, *JC*₁ docketed against *JD*, and, less than ninety days later, *JD* filed for bankruptcy. See *id.* at 1412–13. The court held that *JC*₁ had received a voidable preference by docketing against *JD* within ninety days of bankruptcy, but this could only be so if *JC*'s docketing against *JD* established *JC*'s lien on the property of *X*. See *id.* at 1417–18. In other words, the court assumed *JD*, not *X*, was the owner of the property all along.

⁴³⁶ 18 B.R. 384 (Bankr. W.D.N.Y. 1982).

⁴³⁷ *Id.* at 386.

⁴³⁸ *Id.* at 385.

⁴³⁹ See *id.* at 387–88. Had *JC*₁'s docketing against *JD* been within the preference period, it would have been hard to call the alleged lien a preference. The lien would be a transfer from *X* to *JC*₁, not a transfer from *JD* to *JC*₁. Carlson, *supra* note 424, at 176.

⁴⁴⁰ 324 B.R. 199 (Bankr. W.D.N.Y. 2005).

⁴⁴¹ See *supra* text accompanying notes 312–320.

⁴⁴² *Wallach*, 324 B.R. at 202.

⁴⁴³ *Id.* at 202, 204–05.

theory is encumbered by *JC*'s valid lien. If *JC* has a docketing lien against *X*'s property, where *JD* conveys fee simple absolute to *X*, then *JC* equally has a lien against *A*'s mortgage, if that mortgage is a fraudulent conveyance. Of course, the better view is that *JC* has *no* docketing lien against property *JD* has already conveyed to third parties prior to docketing.

But even if *Faraldi* and *Lawson* correctly ruled that docketing against *JD* creates a lien on the property of *X*, these liens should have been fully avoidable by the bankruptcy trustee. In both cases, the trustee had an independent right to recover the fraudulently conveyed property from *X* under sections 544(b)(1) or 548 of the Bankruptcy Code. *JC* would have been a transferee of a transferee and therefore just as liable as *X* for the fraudulent conveyance, pursuant to section 550(a)(1).⁴⁴⁴ As a transferee of a transferee, *JC* might conceivably be eligible for the defense of section 550(b)(1), but *JC* must show herself to be "without knowledge of the voidability of the transfer avoided."⁴⁴⁵ Since *JC* had initiated fraudulent conveyance litigation in both of these cases, this defense surely would not apply.⁴⁴⁶

One possible idea for reconciling the New York position with the text of section 278(1) of the Debtor and Creditor Law is to say that docketing against *JD* gives *JC* an *equitable lien* against *X*'s property.⁴⁴⁷ Such an idea would preserve *X*'s power to convey the property free of *JC*'s rights to a bona fide purchaser, as section 278(1) directly bestows. The equitable lien would then be subject to the six-year statute of limitations, not the near-ten year duration demanded by CPLR 5203(a), which applies to docketing liens, not equitable liens.⁴⁴⁸ But such a position generates its own problems. Fraudulent conveyance law empowers both judgment creditors and creditors whose debts are not yet mature to set aside fraudulent conveyances.⁴⁴⁹ Why should *JC*, who has docketed against *JD*, have an automatic priority over the unmatured creditor who is the first to obtain relief against *X*? New York's fraudulent conveyance law by no means justifies such a conclusion. The priority of *JC*₁ over subsequently

⁴⁴⁴ See 11 U.S.C. § 550(a)(1) (2000).

⁴⁴⁵ *Id.* § 550(b)(1).

⁴⁴⁶ See Carlson, *supra* note 424, at 178 (analyzing the section 550(a)(1) defense in this context).

⁴⁴⁷ See N.Y. DEBT. & CRED. LAW § 278(1) (McKinney 2008).

⁴⁴⁸ See N.Y. C.P.L.R. § 5203(a) (McKinney 2008).

⁴⁴⁹ See N.Y. DEBT. & CRED. LAW § 279.

docketing creditors or over unmatured creditors who have obtained judicial relief is based solely on the misconception that *JD*'s conveyance to *X* is void and that *X*'s property is really *JD*'s property. This confusion insufficiently grounds *JC*₁'s priority over those creditors who first obtain relief against *X*.

It is also possible for the New York courts to reverse their rule on docketing against fraudulently conveyed property. The troubling precedents in New York date from the nineteenth century. Since then, there have been some non-binding *Erie* guesses as to the content of New York law, but no direct rulings by the New York courts.⁴⁵⁰ It is therefore open for New York courts to decide that the enactment of the Uniform Fraudulent Conveyance Act ("UFCA")⁴⁵¹ in 1925 effectively reverses these old precedents.⁴⁵² On this premise, where *JD* conveys to *X* prior to any docketing, no *JC* has a lien.

⁴⁵⁰ Besides the above-cited bankruptcy cases, there is also *In re Luftman*, 245 F. Supp. 723 (S.D.N.Y. 1965), where the assertion that *JC*₁ has a lien against *X*'s property upon docketing against *D* was unnecessary to the result. In *Luftman*, *JD* conveyed property fraudulently to *X*. *JC*₁ then docketed a judgment. *JC*₂ subsequently docketed. *JC*₁ obtained a declaration from the Supreme Court of Westchester County that *X* had received a fraudulent conveyance. Properly, this judicial action is what made *X*'s property susceptible to *JC*₁'s lien for the first time. Finally, *JD* filed for bankruptcy, where *X*'s land was liquidated.

*JC*₂ claimed it was entitled to share the proceeds pro rata with *JC*₁. According to *JC*₂, the property was after-acquired property, insofar as the judgment creditors were concerned. That is to say, when *JD* conveyed the property to *X*, *JD* successfully alienated all interest in the land. So when *JC*₁ and *JC*₂ docketed, *D* had no land. This much was true.

*JC*₂, however, transgressed the bounds of plausible manners by claiming that, when *JC*₁ had judicial relief against *X*, the effect of this relief was to "void" the conveyance so that *JD* was absolute owner of the property thereafter. This supposedly meant that *JC*₁ and *JC*₂ both obtained after-acquired property liens simultaneously. Here *JC*₂ tried to exploit the metaphorical confusion that fraudulent conveyance are void, not just voidable at the behest of specific creditors. If *JC*₂ was correct in this regard, then fraudulent conveyance actions by one creditor are always collective actions for all creditors (or at least for those with docketed judgments at the time of the individual creditor action).

The *Luftman* court ruled for *JC*₁, which was the right result, but it did so for a regrettable reason. The real property was not after-acquired property, the court reasoned. Rather, *JD* never conveyed to *X* at all. So *JC*₁'s docketing lien attached to *X*'s property at the moment *JC*₁ docketed. So conceived, *JC*₁ was first in time and therefore first in right. Imagine, however, that *JC*₂ was the one to initiate the fraudulent conveyance action. On the reasoning of the *Luftman* court, *JC*₁ is entitled to benefit from the fruits of *JC*₂'s labor.

⁴⁵¹ See *Am. Sur. Co. v. Conner*, 251 N.Y. 1, 6, 166 N.E. 783, 785 (1929).

⁴⁵² One near-holding is *North Fork Bank v. Schmidt*, 265 A.D.2d 466, 697 N.Y.S.2d 106 (2d Dep't 1999), where *JC*₁ was initially awarded priority to fraudulently conveyed property by virtue of docketing against *JD* before *JC*₂ did.

This conclusion is justified by an examination of the UFCA's remedial provisions. But, before we make that examination, it should be noted that the CPLR gives no advice on how to proceed when real property is fraudulently conveyed. In personal property cases, *JC* might bring a turnover proceeding under CPLR 5225(b), which is specifically geared to fraudulent conveyances from *JD* to *X*:

Upon a special proceeding commenced by the judgment creditor, against a person in possession [of] . . . personal property . . . where it is shown that . . . the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person . . . to deliver . . . personal property . . . to a designated sheriff.

This statute is useless in a real property case,⁴⁵³ but sections 278 and 279 of the New York Debtor and Creditor Law apply to real and personal property alike. According to section 278, if a creditor's claim has "matured[,] . . . [h]ave the conveyance set aside . . . to the extent necessary to satisfy his claim, or . . . [d]isregard the conveyance and attach or levy execution upon the property conveyed." Certainly judgment creditors of *JD* have "matured" claims (though creditors without judgments also may qualify as mature creditors).⁴⁵⁴ This section indicates that *JC* might "levy" against *X*'s property. In New York, levy is accomplished under CPLR 5235, but this section authorizes a levy only "upon any interest of the judgment debtor in real property." *Ex hypothesi*, *JD* has no interest in *X*'s real property.

The court reversed on the ground that *JC*₁ could not show the conveyance was fraudulent against him under Debtor and Creditor Law section 273-a. The court remanded for a finding on whether *JC*₁ could show a fraudulent conveyance under a different section of the New York Debtor and Creditor Law. It did not quite, however, find that the first to docket against *JD* has priority to property previously conveyed away.

⁴⁵³ But see *Clarkson Co. v. Shaheen*, 533 F. Supp. 905, 922-24 (S.D.N.Y. 1982) (entertaining fraudulent conveyance avoidance of real property under CPLR section 5225(b)). In the end, the *Shaheen* court declared that, if *JC* would serve an execution on the sheriff, the sheriff could sell the transferee-wife's interest in the tenancy by the entireties as if it were *D*'s property. It also declared that the wife must forfeit her survivorship right in the tenancy as a penalty for receiving a fraudulent conveyance of her husband's cotenancy. Needless to say, this goes beyond fraudulent conveyance law, which allows *JC* to place a judicial lien only on the property *D* conveyed to her. See *Marine Midland Bank v. Murkoff*, 120 A.D.2d 122, 132, 508 N.Y.S.2d 17, 24 (2d Dep't 1986) (disapproving of *Shaheen*).

⁴⁵⁴ *Conner*, 251 N.Y. at 7-8, 166 N.E. at 785.

So as a practical matter, *JC* can only “[h]ave the conveyance set aside . . . to the extent necessary to satisfy his claim.”

Meanwhile, creditors without judgments fall under Debtor and Creditor Law 279, which provides:

Where a conveyance made or obligation incurred is fraudulent as to a creditor whose claim has not matured he may proceed in a court of competent jurisdiction against any person against whom he could have proceeded had his claim matured, and the court may,

- a. Restrain the defendant from disposing of his property.
- b. Appoint a receiver to take charge of the property,
- c. Set aside the conveyance or annul the obligation, or
- d. Make any order which the circumstances of the case may require.⁴⁵⁵

Eliminated here is the option of proceeding directly to levy, as the creditor has no judgment yet against *X*.

What these provisions imply is that (1) *JD*’s judgment creditors must “set aside” the conveyance; they may not levy; and (2) *JD*’s non-judgment creditors have rights against *X* no worse or no better than *JD*’s judgment creditors. Both types of creditors must proceed against *X* in supplemental proceedings. And the first party to commence the action establishes priority for her claim (even if it is not yet reduced to judgment).⁴⁵⁶ This is the implication of *in custodia legis*. *In custodia legis* is an extra-statutory idea, as illustrated by *Clarkson Co. v. Shaheen*.⁴⁵⁷

In *Clarkson*, the debtor fraudulently conveyed certificated securities to *X*. *JC*₁ commenced a turnover proceeding against *X*, as authorized by CPLR 5225(b). *X* responded by claiming the transfer was in good faith and for a fair consideration. Regrettably, the CPLR is clear that *commencement* of the action creates no judicial lien. Rather, a lien arises only when “a judgment creditor has *secured* an order for delivery

⁴⁵⁵ N.Y. DEBT. & CRED. § 279 (McKinney 2008)

⁴⁵⁶ *Miller v. Sherry*, 69 U.S. 237, 249 (1865) (Illinois law); *Senter v. Williams*, 32 S.W. 490, 491 (Ark. 1895) (“Though it is the favorite policy of a court of equity to distribute assets equally among creditors *pari passu*, yet, whenever a judicial preference has been established, by the superior legal diligence of any creditor, that preference is always preserved, in the distribution of assets, by the court.”); *Shepler v. Whalen*, 119 P.3d 1084 (Colo. 2005); *Davidson v. Burke*, 32 N.E. 514 (Ill. 1892).

⁴⁵⁷ 716 F.2d 126.

of . . . personal property.”⁴⁵⁸ But, since section 5225(b) does not apply to real property cases, its restrictive rule on lien commencement can be ignored.

Before the District Court in *Clarkson* decided whether *JC*₁ was entitled to a turnover, the court required *X* to hand over the equity shares to an officer of the court, while it pondered the bona fides of *X*. Thereafter, *JC*₂ “levied” the shares.⁴⁵⁹ If the matter were governed by the CPLR alone, *JC*₂ should have prevailed, as *JC*₂ levied before *JC*₁ obtained a turnover order.⁴⁶⁰ The court nevertheless held for *JC*₁; the shares were in *custodia legis* at the time of the levy. Therefore, the court officer held the property in trust for *JC*₁. The most *JC*₂ could have was the surplus.

Clarkson is therefore no mere interpretation of the CPLR, where turnover orders are limited to personal property. Rather, it is an extra-statutory principle that can apply equally well as to real property.⁴⁶¹ It establishes that where *JC*₂ is the second to docket against *JD* and where *JC*₂ brings *X*'s property *in custodia legis*, *JC*₂ has priority to the proceeds of the equitable proceeding, even though senior judgments against *JD* are outstanding.

Clarkson emphasizes that the moment of *in custodia legis* is when *X* actually delivered certificated shares to an officer of the court. But this seems unnecessary to the decision. Once the *Clarkson* court had jurisdiction over the person of *X*, the property that *X* held was already *in custodia legis*.⁴⁶² In the real estate

⁴⁵⁸ N.Y. C.P.L.R. 5202(b) (McKinney 2008) (emphasis added); see also *County Nat'l Bank v. Inter-County Farmers Coop. Ass'n*, 65 Misc. 2d 446, 317 N.Y.S.2d 790 (Sup. Ct. Sullivan County 1970).

⁴⁵⁹ The *Clarkson* court does not discuss the form this levy took. Stock certificates are property capable of delivery. N.Y. C.P.L.R. 5201(c)(4). But, where the stock is in the “lawful possession of [a] pledgee[],” *id.* 5232(b), the equity interest in stock can be levied by service of the execution. *Knapp v. McFarland*, 462 F.2d 935, 942 (2d Cir. 1972).

⁴⁶⁰ See N.Y. C.P.L.R. 5234(c).

⁴⁶¹ See, e.g., *Memphis Sav. Bank v. Houchens*, 115 F. 96, 112 (8th Cir. 1902) (discussing the commencement of case to administer trust that rendered trust assets free of subsequent levies).

⁴⁶² See *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229 (1922) (“Where the action is in rem the effect is to draw to the federal court the possession or control, *actual or potential*, of the res, and the exercise . . . impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction.” (emphasis added)).

context, what would be the equivalent? The answer would be commencement of a supplementary proceeding under the authority of sections 278 or 279 of the New York Debtor and Creditor Law.⁴⁶³ To be sure, it is prudent for *JC* to file a notice of pendency under New York law.⁴⁶⁴ Even after *JC* has established priority by commencing an action against *X*, *X* still has the power to convey a clear title to a bona fide purchaser for value.⁴⁶⁵ A notice of pendency would serve to perfect *JC*'s right to obtain *X*'s property, where *X* has received a fraudulent conveyance from *JD*.⁴⁶⁶

IX. HOMESTEAD RIGHTS

New York provides a \$50,000 exemption for a homestead.⁴⁶⁷ For married couples, the joint amount is \$100,000.⁴⁶⁸ A

⁴⁶³ See *Metcalfe Bros. v. Barker*, 187 U.S. 165, 172–73 (1902).

⁴⁶⁴ See N.Y. C.P.L.R. 6501. The notice of pendency statute, which dates back to 1848, repeals the notion that the world is on notice of *JC*'s property claim when *JC* commences the action against *X*. Today, the notice of pendency (not commencement) is what puts the world on notice. *Deerfield Bldg. Corp. v. Yorkstate Indus., Inc.*, 77 Misc. 2d 302, 304–05, 353 N.Y.S.2d 331, 334–35 (Sup. Ct. Westchester County 1974).

⁴⁶⁵ N.Y. DEBT. & CRED. LAW § 278(1) (McKinney 2008).

⁴⁶⁶ See, e.g., *Joslin v. Lopez*, 309 A.D.2d 837, 839, 765 N.Y.S.2d 895, 898 (2d Dep't 2003); *Bennett v. Bennett*, 62 A.D.2d 1154, 1154, 404 N.Y.S.2d 171, 172 (4th Dep't 1978). In *Bank Leumi Trust Co. v. Liggett*, 115 A.D.2d 378, 496 N.Y.S.2d 14 (1st Dep't 1985), *JD* conveyed real property to *X*. *JC* then joined *X* in a motion to set aside the conveyance as fraudulent. A notice of pendency was filed. *JC* then obtained a judgment against *JD*. An execution was served on the sheriff who then was able to sell *X*'s title in the property. The notice of pendency established the ability of the sheriff to sell free of any transferee of *X* subsequent to the notice of pendency. In *Liggett*, *X* had conveyed two mortgages after the notice of pendency. These mortgages were property foreclosed in the execution sale. The result of the case is entirely consistent with the premise that *JC* has no lien on *X*'s real property by virtue of docketing against *JD*, unless *JC* also commences a proceeding against *X*.

⁴⁶⁷ Historical and Statutory Notes to N.Y. C.P.L.R. 5206(a) (McKinney 2008). This amount, raised from \$10,000, became effective on August 30, 2005. *Id.* The \$10,000 was a raise from an earlier \$2,000 exemption. Notes of Decisions to N.Y. C.P.L.R. 5206(a) (McKinney 2008). The earlier raise was not retroactively effective. *Perry v. Zarcone*, 77 A.D.2d 881, 881, 50 N.Y.S.2d 50, 50 (2d Dep't 1980). The new raise, so far, has been retroactively applied, in spite of the takings clause of the Fourteenth Amendment. *In re Trudell*, 381 B.R. 441, 444 (Bankr. W.D.N.Y. 2008); *CFCU Cmty. Credit Union v. Little (In re Little)*, No. 05-69113, 2007 U.S. Dist. LEXIS 70638, at *11 (N.D.N.Y. Sept. 24, 2007); *In re Brown*, No. 06-30199, 2007 Bankr. LEXIS 2486, at *48–51 (Bankr. N.D.N.Y. July 23, 2007). The Second Circuit gleefully side-stepped the issue when it found cause to dismiss an appeal. *Weber v. U.S. Tr.*, 484 F.3d 154, 161–62 (2d Cir. 2007).

⁴⁶⁸ *In re Martiny*, 378 B.R. 52, 53 (Bankr. W.D.N.Y. 2007); see also *Mfrs. & Traders Trust Co. v. Borst*, 128 Misc. 2d 691, 692, 490 N.Y.S.2d 665, 667 (Sup. Ct. Erie County 1984).

homestead is defined as property "owned and occupied as a principal residence."⁴⁶⁹ The homestead has been stretched to cover the home in which a debtor's estranged family lives, while the debtor lives elsewhere.⁴⁷⁰ But where the ex-spouse is *JC* against the non-resident *JD*, *JD* has not been permitted the homestead exemption.⁴⁷¹ Weekend getaways are not homesteads.⁴⁷²

Typically, the home is real property,⁴⁷³ but it can also be personal property—shares of a co-operative apartment

⁴⁶⁹ N.Y. C.P.L.R. 5206(a). Where a debtor owns a farm as a homestead, and where the residence is sold in a mortgage foreclosure sale but other farmland is left unsold, the remaining farmland cannot be viewed as a homestead. *In re Ellerstein*, 105 B.R. 214, 217 (Bankr. W.D.N.Y. 1989). In *Ellerstein*, the debtor listed the entire farm as the homestead. The mortgagee then obtained a lifting of the automatic stay, resulting in a sale of the residence. The trustee, however, never objected to the exemption but was still able to claim the non-residential excess was not exempt. This part of the opinion is probably overruled by *Taylor v. Freeland & Kronz*, which held that a trustee must object to the exemption within the thirty day deadline of Federal Rules of Bankruptcy Procedure Rule 4003. 503 U.S. 638, 643 (1992).

⁴⁷⁰ *In re Pearlman*, 54 B.R. 455, 457 (Bankr. S.D.N.Y. 1985); *In re Warren*, 38 B.R. 290, 293 (Bankr. N.D.N.Y. 1984).

⁴⁷¹ *In re Thomas*, 27 B.R. 367, 371 (Bankr. S.D.N.Y. 1983); *Fontana v. Fontana*, 89 A.D.2d 843, 843, 453 N.Y.S.2d 23, 23 (2d Dep't 1982). It has been suggested that *Fontana* is explained by the fact that the non-resident debtor had no intent ever to return to the unhappy marital home. *Warren*, 38 B.R. at 294.

⁴⁷² *In re Miller*, 103 B.R. 65, 67–68 (Bankr. N.D.N.Y. 1989) (only one homestead per customer); *In re Galcia*, 59 Misc. 2d 511, 514, 299 N.Y.S.2d 723, 726 (Sur. Ct. N.Y. County 1969) (in the context of a refund under New York Social Service Law).

⁴⁷³ There is conflicting authority on whether section 5206(a) applies to mere equitable title (where *JD* is actually living on the property). In *In re de Kleinman*, 172 B.R. 764, 775 (Bankr. S.D.N.Y. 1994), *JD* had purchased a condo, but the condo board nixed the deal. *JD* moved in anyway (or so the court assumed). Under the sales contract, the seller agreed to hold title in trust for *JD*. The *de Kleinman* court inexplicably ruled that *JD* was not entitled to the exemption because equitable ownership was not good enough under section 5206(a). Citing *Black's Law Dictionary*, *JD* did not "own" a residence. "In common legal parlance, 'ownership' means having 'good legal title.'" *Id.* at 772 (citing BLACK'S LAW DICTIONARY 1105 (6th ed. 1990)). In *In re Martinez*, No. 08-71123-478, 2008 WL 3891224 (Bankr. E.D.N.Y. Aug. 18, 2008), *JD* had inherited a cotenancy from her father. Apparently, the house had been lost earlier in a tax foreclosure procedure but was successfully redeemed by the administrator of the father's estate. Pursuant to the redemption, Suffolk County deeded the property to the administrator. *JD* therefore had an equitable interest in the property. The *Martinez* court found *JD* had the right to the exemption. The *Martinez* court upheld the exemption and criticized the *de Kleinman* court for relying on an out-of-date *Black's Law Dictionary*. See also *In re Mastowski*, 135 B.R. 1, 1 (Bankr. W.D.N.Y. 1992) (vendor in a land sales contract allowed the exemption, since the contract was treated as a mortgage under New York law).

corporation or a mobile home.⁴⁷⁴ Our eternal home is not overlooked. A burial plot, that small model of barren earth that serves as paste and cover to our bones, is also exempt.⁴⁷⁵

The homestead exemption is good against judicial liens only.⁴⁷⁶ It is certainly no good against mortgages,⁴⁷⁷ mechanics' liens,⁴⁷⁸ or criminal fines.⁴⁷⁹ Nor will it prevent a constructive trust theory from doing its work.⁴⁸⁰

Upscale *JDs* will own the equity in houses valued at more than \$50,000. In such cases, the CPLR provides a "special proceeding"⁴⁸¹ for *JC* to sell all of *JD's* interest in the property. Where, however, the homestead has equity worth less than \$50,000 after all senior liens are considered, there can be no sale.⁴⁸² Nevertheless, a court will not upset an execution sale even if the winning bid is less than the homestead amount, where a third party is the good faith bidder who is entitled to 5236(c) protection.⁴⁸³ The rule seems otherwise where *JC* bids in and obtains the property.⁴⁸⁴

⁴⁷⁴ N.Y. C.P.L.R. 5206(2), (4); see also *Miller*, 103 B.R. at 67 (noting that a boat might be covered). These expansions were added in 1977. The expansions were not good against debts incurred prior to August 22, 1977. *Michaels v. Chem. Bank*, 110 Misc. 2d 74, 76-77, 441 N.Y.S.2d 638, 640-41 (Sup. Ct. N.Y. County 1981) (guaranty not a debt for this purpose); *Corbin v. Litke*, 105 Misc. 2d 94, 98, 431 N.Y.S.2d 800, 802 (Sup. Ct. Suffolk County 1980).

⁴⁷⁵ N.Y. C.P.L.R. 5206(f). This section exempts no more than a quarter acre. It must already have been used to bury a corpse other than that of *JD*. It may contain no structure other than vaults "or other places of deposit for the dead, or mortuary monuments." *Id.*

⁴⁷⁶ See *Robinson v. Wiley*, 15 N.Y. 489, 492 (1857) ("The exemption constituted an impediment or bar, to the right of the plaintiff to resort to the land to obtain satisfaction of his judgment, but in no sense of the terms was a claim to, or incumbrance on, the land.").

⁴⁷⁷ *Citibank v. Cambel*, 119 A.D.2d 720, 720, 501 N.Y.S.2d 133, 133 (2d Dep't 1986); *Wyo. County Bank v. Kiley*, 75 A.D.2d 477, 481, 430 N.Y.S.2d 900, 903 (4th Dep't 1980).

⁴⁷⁸ *Robert S. Moore, Inc. v. Whittaker*, 142 Misc. 2d 708, 708, 538 N.Y.S.2d 415, 415 (Schoharie County Ct. 1989).

⁴⁷⁹ *People v. McArdle*, 55 N.Y.2d 639, 641, 430 N.E.2d 1309, 1310, 446 N.Y.S.2d 256, 257 (1981).

⁴⁸⁰ *Wells Fargo Bank Int'l v. Binabdulaziz*, 124 Misc. 2d 1072, 1073, 478 N.Y.S.2d 580, 582 (Sup. Ct. Onondaga County 1984).

⁴⁸¹ N.Y. C.P.L.R. 5206(e) (McKinney 2008).

⁴⁸² See *Reda v. Voges*, 192 A.D.2d 611, 611, 596 N.Y.S.2d 147, 147 (2d Dep't 1993).

⁴⁸³ *Roosevelt Hardware v. Green*, 72 A.D.2d 261, 265-66, 424 N.Y.S.2d 276, 278-79 (2d Dep't 1980).

⁴⁸⁴ See *Sunset View Ass'n v. Olsen*, No. 968/03, 2003 WL 22047895, at *2 (Sup. Ct. Kings County Aug. 26, 2003).

Section 5206(e) is well written, by CPLR standards. Unlike section 5236(g), which unwisely omits distributions to any property claimant except *JCs* and *JDs*, section 5206(e) sensibly provides: "The court, if it directs such a sale, shall so marshal the proceeds of the sale that the right and interest of each person in the proceeds shall correspond as nearly as may be to his right and interest in the property sold."⁴⁸⁵

This section also sensibly makes \$50,000 of the proceeds exempt property for the debtor. The cash is deemed exempt for one year, after which it may be levied by *JC* as personal property. If the cash is rolled over into a new homestead, the exemption in the new homestead continues.⁴⁸⁶ No similar provision exists for the proceeds of personal property exempt under section 5205.

Proceeds of a judicial sale of the homestead are exempt, but this is not so for proceeds of a mortgage foreclosure sale, where a surplus is generated.⁴⁸⁷ In *First Federal Savings & Loan Ass'n v. Brown*,⁴⁸⁸ *JD* granted a mortgage to *A* and lost a judgment to *JC*. *A* then foreclosed and sold to *X* for a price large enough to generate a \$8,667 surplus.⁴⁸⁹ Before the surplus was distributed, *JD* filed for bankruptcy.⁴⁹⁰ Since, at the time, New York provided a \$10,000 real estate exemption, *JD* claimed the entire surplus was "real estate" and therefore awardable to *JD*.⁴⁹¹ The court, however, held that, once the homestead was sold by means other than an execution sale, the proceeds were personal property.⁴⁹² As New York has no exemption for cash, the amount was awarded to *JC*.⁴⁹³

⁴⁸⁵ N.Y. C.P.L.R. 5206(e).

⁴⁸⁶ *Id.*

⁴⁸⁷ In such cases, the receiver conducting the mortgage foreclosure sale must pay the money into the court, and third parties foreclosed by the mortgage have an opportunity to make claims against the surplus according to their priority. N.Y. REAL PROP. ACTS. LAW §§ 1354(4), 1361 (McKinney 2008). If, after all real property claimants are paid, there is still a surplus for the debtor, *JCs* may establish personal property liens against the surplus. See *E. Fed. Sav. & Loan Ass'n v. Sabatine*, 76 A.D.2d 899, 900, 429 N.Y.S.2d 46, 47 (2d Dep't 1980).

⁴⁸⁸ 78 A.D.2d 119, 120, 434 N.Y.S.2d 306, 308 (4th Dep't 1980).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.*

⁴⁹¹ *Id.* at 121, 434 N.Y.S.2d at 309.

⁴⁹² *Id.* at 123, 434 N.Y.S.2d at 310.

⁴⁹³ *JD* had the last laugh by amending her exemption schedule to switch from the state-law exemption to the wildcard federal exemption of section 522(d)(5) of the Bankruptcy Code, which in those days permitted the exemption of any property

In so ruling, the *Brown* court relied on *Mojeski v. Siegmann*,⁴⁹⁴ where the issue was rather different. In *Mojeski*, A foreclosed on a tenancy by the entirety. A surplus resulted. *JD*'s spouse claimed that the cash surplus was held by the entirety, just as the land was. Since *JD*'s judgment creditors were not entitled to *JD*'s share of the cash if *JD* was not the survivor, the spouse reasoned that the creditors should receive no distribution until dilatory time had determined *JD* to be the survivor. The *Mojeski* court ruled that the surplus from a mortgage foreclosure sale was personal property, and personal property could not be held in tenancy by the entirety.⁴⁹⁵ Ergo, in *Brown*, the creditors could have an immediate distribution of *JD*'s share.

The *Brown* result is surprising. If *JC* had held an execution sale before A foreclosed, *JD*'s monetary exemption would have been specifically authorized by CPLR 5206(e). Yet because A foreclosed first, *JD*'s right to the exemption was lost. It is possible to argue against the *Brown* result. When A foreclosed, A foreclosed *JC* and expropriated *JC*'s full foreclosure power. Therefore, within A's master foreclosure was *JC*'s sub-foreclosure of *JD*. Within that sub-foreclosure, *JD* had an exemption to cash, which should be honored in A's foreclosure sale.

Happily for debtors, *Brown* does not apply if *JD* files for bankruptcy with equity in her home and A has a mortgage senior to a judicial lien held by *JC*. In such a case, a sale by the bankruptcy trustee is subject to the rule that all parties with an interest in the property must be adequately protected.⁴⁹⁶ This rule should permit a bankruptcy court to protect *JD*'s \$50,000 exemption, in the context of a sale free and clear of liens.

Yet there is still this dilemma for *JD*. If the property is completely encumbered by A's mortgage and *JC*'s judicial lien,

worth up to \$7,900. Furthermore, *JD* could use section 522(f) to avoid the judicial lien because it impaired her exemption of the proceeds. *Brown v. Dellinger* (*In re Brown*), 734 F.2d 119, 125 (2d Cir. 1984). Effective September 1, 1982, the New York Legislature deprived its citizens of their right to elect federal exemptions in bankruptcy. N.Y. DEBT. & CRED. LAW § 284 (McKinney 2008). *JD*'s amendment to her exemption schedule occurred in 1980. Therefore, *JD*'s shrewd maneuver cannot be repeated.

⁴⁹⁴ 87 Misc. 2d 690, 386 N.Y.S.2d 609 (Sup. Ct. Suffolk County 1976).

⁴⁹⁵ A legislative exception to this rule has been added recently for shares of a cooperative apartment. N.Y. EST. POWERS & TRUSTS LAW § 6-2.1(4) (McKinney 2008).

⁴⁹⁶ 11 U.S.C. § 363(e) (2000).

the trustee cannot sell free and clear of all liens.⁴⁹⁷ In such a case, the trustee abandons the property into the clutches of state foreclosure law, where *JD*'s exemption will be lost, thanks to *Brown*. *JD* can generate some false hope from section 522(c) of the Bankruptcy Code, which provides: "Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose . . . before the commencement of the case"

JD might be able to argue that, once the federal bankruptcy court recognizes *JD*'s New York exemption, it is no longer subject to the disability exploited in the *Brown* case. That is to say, *JD*'s exemption is no longer limited to real property, but is a federally valid exemption regardless of the status of real or personal property under New York law.⁴⁹⁸ Alas, section 522(c) is subject to an exception if *JC* owns "a debt secured by a lien that is— (A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and (ii) not void under section 506(d) of this title" ⁴⁹⁹ Where *JC*'s lien is not avoidable, section 522(c) can be of no help.

JD, however, can defeat *Brown* by using section 522(f)(1) to avoid *JC*'s lien, thereby preserving a surplus in *A*'s foreclosure sale following the abandonment. According to section 522(f)(1): "[T]he debtor may avoid the fixing of a [judicial] lien on an interest of the debtor in property to the extent that such lien impairs an exemption" ⁵⁰⁰

"Impairment" is a defined term. According to section 522(f)(2)(A):

[A] lien shall be considered to impair an exemption to the extent that the sum of—

- (i) the lien;
- (ii) all other liens on the property; and

⁴⁹⁷ *Id.* § 363(f)(3).

⁴⁹⁸ In *In re Bedell*, 173 B.R. 463 (Bankr. W.D.N.Y. 1994), *D* filed for chapter 13 protection. During the case, *A* successfully moved to lift the automatic stay. Having lost the house, *D* then converted her case to chapter 7 liquidation. In the subsequent foreclosure sale, a substantial surplus was generated; no *JC* had a junior lien on the property, though. The chapter 7 trustee protested that, on the strength of the *Brown* case, *D* had forfeited her exemption. The bankruptcy court, however, ruled that, by claiming the exemption in chapter 13, the federal exemption survived the foreclosure sale. *D* therefore received the \$10,000 exemption in effect at that time.

⁴⁹⁹ 11 U.S.C. § 522(c) (2000 & Supp. V 2005).

⁵⁰⁰ *Id.* § 522(f)(1).

(iii) the amount of the exemption that the debtor could claim if there were no liens on the property;

exceeds the value that the debtor's interest in the property would have in the absence of any liens.⁵⁰¹

To see how section 522(f)(1) saves *JD* from the ill aspects of *Brown*, assume *JD*'s house is worth \$150,000 in its unencumbered state. *A*'s senior mortgage is for \$100,000. *JC*'s judgment is \$1 million. Under *Brown*, if *A* forecloses, all of the \$50,000 surplus will be taken by *JC*. But under sections 522(f)(1) and (2)(A), we are to take the sum of \$1 million plus \$100,000 plus \$50,000, and we are to subtract the value of the house "in the absence of any liens" (\$150,000). The result is \$1 million worth of avoidance. *JC*'s judicial lien is therefore entirely avoided.⁵⁰² In *A*'s subsequent foreclosure sale, *JC* has no lien at all,⁵⁰³ and the surplus belongs entirely to *A*.⁵⁰⁴ To reach this goal, *JD* needs a discharge in bankruptcy. A discharge "voids any judgment at any time obtained."⁵⁰⁵ Without a discharge, *JD* can avoid *JC*'s lien, but *JC*'s judgment continues to live. *JC* could therefore have the sheriff garnish the surplus, which is personal property. Under these circumstances, *JD* still loses the homestead if *A* forecloses.

We are not quite done with *Brown*. We must still account for the United States Supreme Court's highly cubist opinion in *Farrey v. Sanderfoot*.⁵⁰⁶ In *Farrey*, a husband and wife were cotenants of their house when they divorced. According to the divorce decree, the husband kept the house but owed the wife cash to balance out the equal division of the marital estate. This

⁵⁰¹ 11 U.S.C. § 522(f)(2)(A).

⁵⁰² Section 522(f)(2) is not self-executing, however. *Moseley v. Milner*, 131 Misc. 2d 126, 128, 499 N.Y.S.2d 609, 610 (Sup. Ct. Ulster County 1986). Where a debtor exempts a homestead and is still subject to a senior mortgage which might be foreclosed, the debtor is vulnerable to the *Brown* holding.

⁵⁰³ Notice that if the surplus exceeds \$50,000, *JD* gets it all—an odd side effect of section 522(f)(1), which is designed only to preserve *JD*'s \$50,000 exemption.

⁵⁰⁴ One case holds that *JC*₁ is entitled to the benefit of *Brown* and therefore *JD* cannot use section 522(f)(1) to avoid *JC*₁'s lien. *Zuaro v. Gertz* (*In re Gertz*), 29 B.R. 37, 38 (Bankr. E.D.N.Y. 1983). But the very judge who decided *Zuaro* overruled himself in *Henry v. Chase Manhattan Bank* (*In re Henry*), 38 B.R. 971, 974 (Bankr. E.D.N.Y. 1984).

⁵⁰⁵ 11 U.S.C. § 524(a)(1).

⁵⁰⁶ 500 U.S. 291 (1991); see also *Owen v. Owen*, 500 U.S. 305, 314 (1991) (remanding case to determine whether judicial lien was simultaneously created with the exempt property, making it unavoidable).

amount was proclaimed to be a judicial lien on the house. The husband then filed for bankruptcy. Claiming the house as exempt property, he ungallantly sought to destroy his ex-wife's judicial lien under section 522(f)(1).

Knowing that ungallantry must be defeated, the Supreme Court refused to avoid the judicial lien. According to Justice Byron White, the purpose of section 522(f)(1) was to relieve debtors who were required to file homestead declarations in the real estate records but who had not done so before judicial liens attached.⁵⁰⁷ In bankruptcy, the judicial liens could be avoided, even if the property only became exempt later, thereby preventing the consequences of a lost race to the courthouse.⁵⁰⁸

Given the purpose of race avoidance, it supposedly followed that section 522(f) does not apply in any circumstance in which the parties would not engage in a race to the courthouse. One such instance is when the debtor owns no property at all at the time a judgment is rendered against him. In such a case, creditors would hardly invest in racing to the courthouse. Here, Congress could not have intended for section 522(f) to apply. This imagined policy led to a curious definition of what it meant to "fix" a lien. According to Justice White:

⁵⁰⁷ Only some states require this. Prior to 1977, New York did also, but no longer does. *In re Lightstone*, 253 F. 456, 456 (W.D.N.Y. 1918); *Robinson v. Wiley*, 15 N.Y. 489, 490 (1857); see also *Corbin v. Litke*, 105 Misc. 2d 94, 431 N.Y.S.2d 800 (Sup. Ct. Suffolk County 1980).

⁵⁰⁸ This at least appears to be the race that Justice White deplored. See *Farrey*, 500 U.S. at 298 (describing section 522(f)(1)'s "purpose of preventing a creditor from beating the debtor to the courthouse"). Elsewhere, he also deplores a race between creditors to get judicial liens, a province of voidable preference law. *Id.* (describing section 522(f)(1)'s role in replacing section 67(a) of the Bankruptcy Act).

Justice White, then, conceives of creditors rushing to the courthouse to get liens in anticipation of bankruptcy. *Id.* at 300-01. This might justify voidable preference law, but it cannot suffice to justify section 522(f). See C. Robert Morris, *Bankruptcy Fantasy: The Site of Missing Words and the Order of Illusory Events*, 45 ARK. L. REV. 265, 288-89 (1992) (criticizing Justice White's invocation of voidable preference concepts). As far as the debtor's exemptions are concerned, the race cannot be conceived as beginning with unsecured creditors wishing for the first time to obtain liens. Creditors cannot have judicial liens on demand. They must win judgments, which require notice to the debtor, not to mention trials, motions and the like. The debtor can easily beat creditors to the courthouse to preserve their homestead if what we have is creditors starting off from an unsecured position hoping to get quick judicial liens.

Contrary to Justice White's theory, if Congress had in mind the abolition of a race, it must be a race in which *JD* has just lost a judgment and has not filed a homestead declaration. It is not *JC* who will be rushing to the courthouse but only *JD*.

Section 522(f)(1) does not state that any fixing of a lien may be avoided; instead, it permits avoidance of the “fixing of a lien on an interest of the debtor.” If the fixing took place *before the debtor acquired that interest*, the “fixing” by definition was not on the debtor’s interest. Nor could the statute apply given its purpose of preventing a creditor from beating the debtor to the courthouse, since the debtor at no point possessed the interest without the judicial lien. There would be no fixing to avoid *since the lien was already there*. To permit lien avoidance in these circumstances, in fact, would be to allow judicial lienholders to be defrauded through the conveyance of an encumbered interest to a prospective debtor. For these reasons, it is settled that a debtor cannot use [section] 522(f)(1) to avoid a lien on an interest acquired after the lien attached.⁵⁰⁹

Thus, section 522(f) can apply only when the debtor owns property first and then, subsequently, a lien fixes to this property. Where the lien attaches simultaneously with the debtor’s obtainment of after-acquired property, section 522(f) cannot have any effect on the lien.⁵¹⁰

Justice White refers to liens affixed before the debtor ever acquires the property. This view is nothing more than a classic commercial law blunder: A lien might exist before the debtor has acquired property. This is the very error that the court in *Hulbert v. Hulbert*⁵¹¹ sought to dispel when it found that

⁵⁰⁹ *Farrey*, 500 U.S. at 298–99 (emphases added) (citation omitted).

⁵¹⁰ Ironically, not even this reasoning requires victory for the ex-wife. According to Justice White, the husband and wife were cotenants. The divorce decree wiped out their property interests. Later, for the first time, the ex-husband received a new property interest—fee simple absolute as encumbered by mortgages and the ex-wife’s judicial lien. So conceived, the husband’s equity in the property was created coevally with the judicial lien. *See id.* at 292.

It is quite possible to characterize the events differently. According to Justice Anthony Kennedy’s concurring opinion, it is possible that the divorce decree did not terminate the husband’s interest at all. Rather, it preserved and continued the husband’s cotenancy and added the wife’s cotenancy to it. In addition, the wife received a judicial lien on the entirety. *Id.* at 302 (Kennedy, J., concurring). On this view, the husband’s interest in the property *did* antedate the wife’s judicial lien, at least in part.

Justice White sought to defeat this reasoning by reading the divorce decree as encumbering—not the husband’s preexisting cotenancy—but only the cotenancy the husband gained in the divorce decree. Since the judicial lien did not antedate the husband’s acquisition of the cotenancy, the judicial lien could not be avoided. *Id.* at 300–01 (majority opinion). This reasoning functions so long as the wife’s claim against her former cotenancy was less than the value of the cotenancy. It was unfortunate for the ex-wife if she was undersecured on this reasoning.

⁵¹¹ 216 N.Y. 430, 441, 111 N.E. 70, 73 (1916).

docketing creates no lien until the debtor actually owns property. For this reason, the *Hulbert* case proclaimed that competing judgments docketed before debtor acquisition create coeval liens.

Putting the holding in *Farrey* together with the effect of bankruptcy on the *Brown* holding, if *JD* owned property before *JC* docketed, *JD* can use section 522(f)(1) avoidance to reverse the result in *Brown*. But, absurdly, if *JD* acquired the property after *JC* docketed, *Farrey* prevents the avoidance of *JC*'s lien. The Second Circuit so ruled in *Marine Midland Bank v. Scarpino (In re Scarpino)*.⁵¹² In after-acquired property cases, *Brown* continues to reign and *JD* forfeits the exemption in the surplus from the mortgage foreclosure sale.⁵¹³

X. TENANCIES BY THE ENTIRETY

Whatever may be true of judicial liens on New York real estate, the influence of CPLR 5240 must never be neglected. According to the provision of section 5240:

The court may at any time, on its own initiative or the motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure.

This provision allows the courts to change the rules whenever they want. The provision basically proves the Hegelian point that no law is law. We have seen that New York courts have used CPLR 5240 to charge *JC* with the fair market value of real property, where the creditor was the buyer at the execution sale.⁵¹⁴ Nevertheless, the Court of Appeals has prohibited the

⁵¹² 113 F.3d 338 (2d Cir. 1997). The Second Circuit can hardly be blamed for following what *Farrey* clearly requires. The bankruptcy court tried to claim that *Hulbert* did not hold that lien creation was simultaneous with *JD*'s acquisition. Rather, *Hulbert* coheres with the idea that *JD* acquired property and, thereafter, at some future time, the judicial liens of *JC*₁ and *JC*₂ attached to *JD*'s property. *In re Scarpino*, 196 B.R. 16, 18–19 (Bankr. W.D.N.Y. 1996), *vacated*, 113 F.3d 338 (2d Cir. 1997). In other words, the lower court fought metaphysics with metaphysics. The Second Circuit properly observed that there was no time at which *JD* could have conveyed free of these judicial liens. Therefore, in *Hulbert*, *JD*'s acquisition and lien creation were simultaneous, thus sinking *JD*'s right to use section 522(f)(1) to avoid after-acquired property liens.

⁵¹³ Similarly where *JD* conveys to his wife after *JC*₁ docketed against *JD*, and where the wife files for bankruptcy, *Farrey* prevents the wife from using 522(f)(1) to limit *JC*₁. See *In re LaBorde*, 231 B.R. 162, 167 (Bankr. W.D.N.Y. 1999).

⁵¹⁴ See, e.g., *Wandschneider v. Bekeny*, 75 Misc. 2d 32, 37, 346 N.Y.S.2d 925, 930–31 (Sup. Ct. Westchester County 1973).

use of section 5240 in order to rescind an execution sale solely because the price bid by a third party buyer was too low.⁵¹⁵

Courts have also used CPLR 5240 to limit execution upon a tenancy by the entirety,⁵¹⁶ making it a kind of exempt property. In these cases, *H* and *W* own a house as tenants by the entirety. In New York, creditors of the individual spouses can obtain a lien on the tenancy of the debtor spouse.⁵¹⁷ At an execution sale, where *H* is the judgment debtor and *X* is the buyer, *X* obtains a cotenancy with *W*,⁵¹⁸ subject to *W*'s right to *X*'s share if *W* survives *H*.⁵¹⁹ Neither *X* nor *W* can force his or her cotenant into a partition sale.⁵²⁰

In these cases, *H* typically has conveyed his encumbered cotenancy to *W* and has moved out. Typically, the creditor has documented no other attempts to collect from *H*.⁵²¹ On *W*'s motion, the court restrains *JC* from executing on *H*'s cotenancy "until the house becomes vacant, is sold, or the wife predeceases the husband, or at such other time as the respondent may be able

⁵¹⁵ *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 521, 392 N.E.2d 1240, 1243, 419 N.Y.S.2d 56, 60 (1979); see also *supra* text accompanying notes 228–232.

⁵¹⁶ See, e.g., *Seyfarth v. Bi-County Elec. Corp.*, 73 Misc. 2d 363, 365, 341 N.Y.S.2d 533, 535 (Sup. Ct. Nassau County 1973); *Hammond v. Econo-Car of the N. Shore, Inc.*, 71 Misc. 2d 546, 548, 336 N.Y.S.2d 493, 495 (Sup. Ct. Nassau County 1972) ("Perhaps the only value of the immediate execution upon the husband's interest here is to put pressure on the wife, either to sell the house, or to pay off an obligation that is not hers."); *Gilchrist v. Commercial Credit Corp.*, 66 Misc. 2d 791, 792, 322 N.Y.S.2d 200, 201 (Sup. Ct. Nassau County 1971).

⁵¹⁷ Where *JC* has a claim against both spouses, then both halves can be put up for sale. Where there are also individual creditors of one spouse, difficult allocation issues can arise. See *Sasario v. Calo*, 63 Misc. 2d 534, 537, 313 N.Y.S.2d 250, 252–53 (Sup. Ct. Onondaga County 1970). Where the joint creditor is senior, it should be possible for the individual creditor to receive the benefit of marshalling of assets, in order to maximize the joint return to both creditors. For example, where the shares are worth \$100 and a joint *JC* claims \$50 and a junior individual *JC* of *H* claims \$50, *W*'s share should entirely go to the joint *JC*, and *H*'s share should go to *H*'s individual *JC*. See 1 GRANT GILMORE & DAVID GRAY CARLSON, *GILMORE AND CARLSON ON SECURED LENDING: CLAIMS IN BANKRUPTCY* § 1.07, at 42–43 (2d ed. 2000).

⁵¹⁸ See *Lover v. Fennell*, 14 Misc. 2d 874, 879, 179 N.Y.S.2d 1017, 1021–22 (Sup. Ct. Queens County 1958).

⁵¹⁹ See *Hammond*, 71 Misc. 2d at 547, 336 N.Y.S.2d at 494–95. When the couple divorces, however, survivorship ends, and *JC* (or the buyer at the execution sale) has an interest in a tenancy in common. *Hohenrath v. Wallach*, 37 A.D.2d 248, 249, 323 N.Y.S.2d 560, 562 (2d Dep't 1971).

⁵²⁰ See *Hammond*, 71 Misc. 2d at 547, 336 N.Y.S.2d at 494. *X* also has no right to evict *JD*, if *JD* is there as guest of his spouse. See *Berlin v. Herbert*, 48 Misc. 2d 393, 395, 265 N.Y.S.2d 25, 28 (Dist. Ct. Nassau County 1965).

⁵²¹ See, e.g., *Gilchrist*, 66 Misc. 2d at 793, 322 N.Y.S.2d at 202.

to show a sufficient change of circumstances which would warrant further relief."⁵²²

Does CPLR 5240 imply that a New York tenancy by the entirety is exempt property? According to Bankruptcy Code 522(b)(3)(B), a bankrupt debtor may exempt "any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety . . . to the extent that such interest as a tenant by the entirety . . . is exempt from process under applicable nonbankruptcy law."⁵²³ Without CPLR 5240, clearly a New York tenancy by the entirety is not exempt, but does it become so in light of New York case law discussed above? In *Community National Bank & Trust Co. v. Persky (In re Persky)*,⁵²⁴ the Second Circuit answered with a resounding no. CPLR 5240 is a discretionary provision that a court may choose to use, not a standing rule of exemption.⁵²⁵ Once the tenancy by the entirety is in the bankruptcy estate, the bankruptcy trustee has the power to impose a partition sale over the opposition of a non-debtor spouse.⁵²⁶ Bankruptcy Code 363(h)(3), however, requires, as condition to such a sale, "the benefit to the estate of a sale of such property free of the interest of co-owners outweighs the detriment, if any, to such [non-debtor] co-owners."⁵²⁷

⁵²² *Seyfarth v. Bi-County Elec. Corp.*, 73 Misc. 2d 363, 366, 341 N.Y.S.2d 533, 536 (Sup. Ct. Nassau County 1973). Relief must be sought, however, before the sheriff sells and distributes the proceeds. *Registrato v. Corso*, 70 Misc. 2d 494, 495, 333 N.Y.S.2d 636, 637 (Sup. Ct. Suffolk County 1972).

⁵²³ 11 U.S.C. § 522(b)(3)(B) (2000) (emphasis added).

⁵²⁴ 893 F.2d 15 (2d Cir. 1989).

⁵²⁵ *Id.* at 18 ("The fact that in individual cases execution against a particular type of property interest may be limited or conditioned by the remedial provisions of CPLR 5240 to prevent disadvantage to certain persons does not as a matter of substantive law transform that particular type of property interest into one generally exempt from the enforcement process.").

⁵²⁶ *Id.* at 16.

⁵²⁷ *Id.* at 17 (court must consider non-economic emotional harm to non-debtor spouse). One court hints that the debtor and her non-debtor spouse are entitled to a moving allowance from the proceeds of a tenancy by the entireties. *See In re Morris*, 115 B.R. 752, 756 (Bankr. E.D.N.Y. 1990) ("As a practical matter this section is usually invoked to sell primary residences when there is enough equity in the property to satisfy secured creditors, pay the non-debtor spouse for his or her interest in the property, pay the debtor's household exemption, and make a meaningful contribution to the unsecured creditors, with enough left over for the debtor and non-debtor spouse to secure alternative living quarters."). In *Morris, JC*, having a lien on *W's* share of a tenancy by the entireties, tried to petition *W* into an involuntary bankruptcy, so that section 363(h) could be used to sell the entire

In an even more radical extension of section 5240, the court in *Holmes v. W.T. Grant, Inc.*,⁵²⁸ prohibited an execution sale of a house where *H* and *W* were both judgment debtors. The grounds for the restraint were simply that loss of the home was too disruptive to the family.⁵²⁹ The restraint was conditioned on payment of \$20 per month on the \$500 debt.⁵³⁰ In effect, the court imposed a chapter 13 wage plan on *JD* in exchange for preventing an execution sale of their home.⁵³¹

Tenancies by the entirety cause an interpretive difficulty when an individual *JD* files for bankruptcy with her spouse and *JD* wishes to avoid part of *JC*'s judicial lien (where the spouse is not a party to the judgment against *JD*). Shall we say that *JD* owns fifty percent of the property, or shall we say that *JD*'s percentage ownership is calculated by the sum of the value of her life estate plus the value of her survivorship rights?

Under state law, the matter is irrelevant. *JC* can only sell *JD*'s cotenancy. In such a sale, *JD* simply obtains a senior right to \$50,000. The matter has bite, however, for section 522(f)(1) avoidances. To take a simple example, suppose *JD* and her spouse own a house by the entirety worth \$200,000 and *JC* has a judgment against only *JD* for \$90,000. According to section

residence, rather than a cotenancy share. *Id.* at 755. But only unsecured creditors may join in an involuntary petition. 11 U.S.C.A. § 303(b)(1) (West 2008). *JC*'s purpose therefore confessed a belief that *JC* was entirely a secured creditor, because only if *JC* were paid in full could a section 363(h) sale proceed to liquidate equity for the benefit of unsecured creditors. *Morris*, 115 B.R. at 756. The court, however, compared apples and oranges. At state law, where partition sales are not permitted, *JC* likely would get a mediocre price, implying an unsecured deficit claim after the cotenancy was valued. If the petition succeeded, then *JC*, undersecured at state law, would become fully secured thanks to the power of section 363(h).

⁵²⁸ 71 Misc. 2d 486, 336 N.Y.S.2d 601 (Sup. Ct. Nassau County 1972).

⁵²⁹ *Id.* at 488, 366 N.Y.S.2d at 603.

⁵³⁰ *Id.*

⁵³¹ A less intrusive use of CPLR 5240 is *BNY Financial Corp. v. Moran*, where the court enjoined the sale of a reversionary interest in a non-residence held by the entireties for a short time until *H* and *W* could find a buyer willing to pay enough to satisfy the senior mortgages and *JC*'s lien. 154 Misc. 2d 435, 437, 584 N.Y.S.2d 261, 263 (Sup. Ct. N.Y. County 1992), *See also* *Kantor v. Mesibov*, No. 2814-06, 2007 WL 415981, at *4-5 (Sup. Ct. Nassau County Feb. 6, 2007) (noting that the tenancy by the entirety had to be valued according to debtor's life expectancy; no sale unless the creditors could show a reasonably substantial amount would be realized after exemption and sheriff's fee); *FDIC v. Lapadula*, 137 Misc. 2d 559, 561-62, 521 N.Y.S.2d 391, 392 (Sup. Ct. Nassau County 1987) (staying the execution sale for six months for the debtor to obtain alternate housing, but requiring that the debtor to pay the *JC* \$750 per month).

522(f)(2)(A), we are to take the sum of the targeted lien (\$90,000), other unavoidable liens (0), and the exemption (\$50,000). From this (\$140,000) we are to subtract the value of *JD*'s real property interest. The result is the amount of avoidance to which *JD* is entitled.

Suppose we say that *JD* is a fifty percent owner of the residence. Then *JD* can use her avoidance power to reduce *JC*'s lien to \$50,000. *JD*'s avoidance right is defined as \$140,000 less \$100,000 (\$40,000), and \$90,000 less \$40,000 (\$50,000). Suppose now the house increases in value to \$240,000. If *JD* and her spouse sell at market value and "redeem" *JC*'s lien by paying *JC* \$50,000,⁵³² *JD* and her spouse jointly obtain \$190,000.

Suppose, on the other hand, *JD* has a very low life expectancy because she is seriously ill. Suppose, on the basis of this, that the value of *JD*'s fifty percent life interest and *JD*'s survivorship right is worth but \$10,000. In such a case, *JC*'s lien can be reduced from \$90,000 to zero, because *JD*'s avoidance right is now \$130,000, which exceeds the amount of *JC*'s lien. In the market sale, *JD* and her spouse keep all the proceeds.

In *In re Levinson*,⁵³³ Judge Dorothy Eisenberg refused to consider life expectancies in calculating section 522(f)(1) avoidance.⁵³⁴ Rather, she relied on the fact that *JD* and his spouse had equal rights to the property. For example, where the property is sold, each spouse is entitled to fifty percent of the proceeds—even if one spouse paid the entire purchase price.⁵³⁵ It is undoubtedly the case that the spouses have equal rights, but, even so, the statute refers to the *value* of the debtor's real property.⁵³⁶ Where that property is subject to survivorship of a non-debtor, undoubtedly the marketplace would view life expectancy as highly significant. Therefore, although the *Levinson* holding has the virtue of being easy to apply, it does not comport with a market-based definition of "value." The abstract

⁵³² The CPLR does not strictly allow this, so our example assumes that either *JC* consents to be redeemed or *JD* obtains relief from the court under the wild card of CPLR 5240. See *supra* text accompanying note 172.

⁵³³ 372 B.R. 582 (Bankr. E.D.N.Y. 2007).

⁵³⁴ *Id.* at 590. This accords with the result reached in *Popky v. United States*, which involved a federal tax lien that attached to a single spouse's tenancy by the entireties in Pennsylvania. 419 F.3d 242, 245 (3d Cir. 2005).

⁵³⁵ See *Secrist v. Secrist*, 284 A.D. 331, 334, 132 N.Y.S.2d 412, 415 (4th Dep't 1954), *aff'd*, 308 N.Y. 750, 125 N.E.2d 107 (1955).

⁵³⁶ 11 U.S.C. § 522(f)(2)(A) (2000).

legal proposition of equality has nothing to do with how the market values the interest of a spouse not likely to be the survivor.⁵³⁷

XI. TAX LIENS V. JUDICIAL LIENS

A. *Local Property Tax*

If *JD* is not paying judgments, he may also not be paying property taxes either. Therefore, the judicial lien may encounter a competing tax lien for local property taxes.

In New York, a municipality is permitted to tax real property. If the tax is not paid, the municipality is prepared to sell fee simple absolute if someone doesn't come forth to pay up. As a result, it is said that the property tax lien is a superpriority tax.

Property taxes are very dangerous to mortgages,⁵³⁸ so mortgage lenders are organized to pay the taxes and add the amount paid to the principal amount of the mortgage loan.⁵³⁹ For this reason, judgment creditors do not always face a senior property tax lien. Instead, they encounter an expanded senior mortgage lien. But should there be a property tax outstanding, it will be senior to any judicial lien.⁵⁴⁰

When a mortgage foreclosure sale occurs in New York, the property tax lien is also foreclosed, and the senior property tax has the highest priority to the sales proceeds.⁵⁴¹ Accordingly, the

⁵³⁷ For a case using life expectancies in valuing a tenancy by the entireties, see *Pletz v. United States (In re Pletz)*, 221 F.3d 1114, 1117 (9th Cir. 2000).

⁵³⁸ See *Berlin Beverage Distribs., Inc. v. City of New York (In re New York—In Rem Foreclosure Action No. 39, Borough of Queens)*, 171 A.D.2d 792, 793, 567 N.Y.S.2d 757, 758 (2d Dep't 1991).

⁵³⁹ See *In re Trabal*, 254 B.R. 99, 104 (D.N.J. 2000) ("Where taxes on property are the responsibility of the mortgagor, but paid by the mortgagee for the benefit of the mortgaged property . . . the mortgagee is entitled to be reimbursed and can add any uncollected monies to the mortgage debt."); Grant S. Nelson, *The Foreclosure Purchase by the Equity of Redemption Holder or Other Junior Interests: When Should Principles of Fairness and Morality Trump Normal Priority Rules?*, 72 MO. L. REV. 1259, 1265–66 (2007).

⁵⁴⁰ *Dime Sav. Bank v. Beecher*, 23 A.D.2d 297, 300, 260 N.Y.S.2d 500, 503 (2d Dep't 1965), *aff'd sub nom. Jamaica Sav. Bank v. Williams*, 18 N.Y.2d 763, 221 N.E.2d 561, 274 N.Y.S.2d 901 (1966).

⁵⁴¹ N.Y. REAL PROP. ACTS. LAW § 1354(2) (McKinney 2008) makes "all taxes, assessments, and water rates which are liens" expenses of the sale. N.Y. REAL PROP. ACTS. LAW § 1354(1) makes expenses of the sale the highest priority, higher than that of the foreclosing mortgagee.

buyer at the mortgage foreclosure sale will pay the full value of the estate, knowing that the property tax lien will disappear after the tax is paid from the proceeds of the sale.

With judicial liens there is no such priority. Under CPLR 5236(g), only judgment creditors, who have served executions before the execution sale, have the right to proceeds. Therefore, buyers at such sales are advised to deduct the amount of the tax lien from the maximum bid, as the title they take will be subject to such liens.

B. Federal Tax Liens

No doubt America's biggest creditor is the Internal Revenue Service ("IRS"). In collecting taxes, the IRS need not rely on money judgments. Rather, federal legislation gives them a tax lien that arises as soon as a tax is assessed.⁵⁴²

Unlike local property taxes, the IRS lien has no superpriority. It is junior to any prior lien, but case law has insisted that the prior lien must be "choate" in order to be senior.⁵⁴³ Choateness implies certainty as to the amount of lien, the identity of the creditor, and the identity of the collateral.⁵⁴⁴

Tax liens arise upon assessment of the tax,⁵⁴⁵ but unless the tax lien is recorded, it is not valid as to judgment creditors (among other persons).⁵⁴⁶

If a tax lien is subsequent to a judicial lien or is unrecorded at the time the judicial lien arises, the judicial lien is senior, and the tax lien is forecloseable in an execution sale. This is established by I.R.C. section 7425, which has two relevant provisions. Subparagraph (a) pertains to judicial sales, and subparagraph (b) pertains to non-judicial sales. Oddly, courts have held that execution sales are not judicial sales. In a judicial sale, a court directly orders that land be sold. But a sale pursuant to an execution served on a sheriff is, apparently, not a

⁵⁴² 26 U.S.C. § 6322 (2000).

⁵⁴³ *United States v. City of New Britain*, 347 U.S. 81, 85-86 (1954) ("first in time is first in right"), *superseded by statute*, Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125 (codified in scattered sections of 26 U.S.C.).

⁵⁴⁴ *Id.* at 84.

⁵⁴⁵ 26 U.S.C. § 6322.

⁵⁴⁶ *Id.* § 6323(a). According to section 6323(f)(1)(A), notice of a lien on real property must be filed "in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated . . ."

court-ordered sale.⁵⁴⁷ So it is subparagraph (b) that governs foreclosure of junior tax liens by senior judicial liens. According to that provision:

Notwithstanding subsection (a) a sale of property on which the United States has or claims a lien . . .

(1) shall . . . be made subject to and without disturbing such lien or title, if notice of such lien was filed or such title recorded in the place provided by law for such filing or recording more than 30 days before such sale and the United States is not given notice of such sale . . . or

(2) shall have the same effect with respect to the discharge or divestment of such lien or such title of the United States, as may be provided with respect to such matters by the local law of the place where such property is situated, if—

(A) notice of such lien or such title was not filed or recorded in the place provided by law for such filing more than 30 days before such sale,

(B) the law makes no provision for such filing, or

(C) notice of such sale is given⁵⁴⁸

This subsection makes the sensible point that in order to foreclose the IRS, notice must be given to the IRS. But section 7425(b)(1) also implies that, where the IRS has not filed its notice more than thirty days before the sale, the IRS is still foreclosed without notice. When the IRS is foreclosed, we have already seen that it has a post-sale right to redeem, by virtue of federal law.⁵⁴⁹ Where the IRS has filed notice more than thirty days before the sale, it is non-forecloseable, even where it is made a party to the foreclosure proceeding.⁵⁵⁰

⁵⁴⁷ See *Myers v. United States*, 647 F.2d 591, 600 n.13 (5th Cir. 1981); *Midway Fin. Corp. v. Walters*, No. 84-0289 HMF, 1991 U.S. Dist. LEXIS 15197, at *11 (D. Haw. July 5, 1991); *A.H. & R.S. Coal Corp. v. United States*, 461 F. Supp. 752, 755 n.1 (W.D. Pa. 1978). But see *Guardian Loan Co. v. Early*, 47 N.Y.2d 515, 520, 392 N.E.2d 1240, 1243, 419 N.Y.S.2d 56, 60 (1979) (stating that in CPLR 2003, entitled "Irregularity in judicial sale" is applicable to executions sales).

⁵⁴⁸ 26 U.S.C. § 7425(b). In addition, section 7425(c)(1) requires notice by registered or certified mail or personal service twenty-five days before the sale. *Midway Fin. Corp. v. Walters*, No. 84-0289, 1989 U.S. Dist. LEXIS 16887, at *9 (D. Haw. July 25, 1989).

⁵⁴⁹ See *supra* text accompanying note 240.

⁵⁵⁰ *Berlin v. United States*, 535 F. Supp. 298, 300 (E.D.N.Y. 1982). In *Berlin*, the buyer argued that senior judicial liens disappear when a junior lien is foreclosed. And since the IRS was in the habit of serving a notice of levy on sheriffs, thereby participating in the proceeds of the sale, the IRS was estopped from denying that its

Although the IRS submits to the regime of first in time is first in right, we have mentioned an exception for inchoate liens. If an earlier lien is not certain as to the identity of the lienor, the amount of the lien, or the property to which the lien attaches, the IRS lien is senior, even though it was second in time. After the Supreme Court invented this doctrine, courts found all sorts of liens were inchoate. The onslaught was too much for Congress, which, in 1966, amended the federal tax lien statute in order to save some (but not all) prior liens from inchoateness. In particular, the article 9 floating lien was preserved from its inherent inchoateness.⁵⁵¹

One thing not saved were judicial liens on real property. As we have seen,⁵⁵² these have a "dragnet" effect of picking up after-acquired property that a debtor obtains after docketing a judgment. Where two or more docketed judgments exist before debtor acquisition, the liens share pro rata as to the after-acquired property. In the standard case where *JD* owns land when *JC* docket, a New York docketing lien is certain as to lienor, amount of judgment, and property lien. In such cases, where the IRS files its notice subsequent to docketing, the docketing lien is clearly senior to the IRS lien. But where both the docketing and the IRS filing of notice precede debtor acquisition, the IRS is senior according to the Supreme Court in *United States v. McDermott*.⁵⁵³ Interestingly, the majority opinion did not proclaim the docketing lien inchoate. It found that the IRS won on a different ground.

In *McDermott*, both the majority and minority of the Supreme Court were under a mistaken view of the facts. Here is what they thought was before them:

- t*₁: *JC* docket, against *JD*. *JD* has no real property. (This was the Supreme Court's error.)
- t*₂: The IRS files notice of a tax lien.
- t*₃: *JD* acquires property.

tax lien was a judicial lien. The court disagreed and held that senior tax liens cannot be foreclosed by junior judicial liens. *Id.* at 303.

⁵⁵¹ The classic study is William Plumb, *Federal Liens and Priorities—Agenda for the Next Decade* (pts. 1–3), 77 YALE L.J. 228, 605, 1104 (1968).

⁵⁵² See *supra* text accompanying notes 373–380.

⁵⁵³ 507 U.S. 447, 451 (1993).

t_4 : *JD* sells to *X*. *JC* and the IRS consent to the sale and agree to do battle over the proceeds.⁵⁵⁴

Supposing these to be the facts, Justice Antonin Scalia, writing for the majority, ruled that the IRS was senior, but not because *JC*'s lien was inchoate. According to Justice Scalia, the docketing lien and the tax lien attached to the property at the same time.⁵⁵⁵ Since the IRS had already filed its notice before the judicial lien attached to the debtor's real property, the IRS had priority on the peculiar way I.R.C. section 6323(a) is worded:

We think, however, that under the language of [section] 6323(a) ("shall not be valid as against any . . . judgment lien creditor until notice . . . has been filed"), the filing of notice renders the federal tax lien extant for "first in time" priority purposes regardless of whether it has yet attached to identifiable property.⁵⁵⁶

In other words, the meaning of section 6323(a) is that, in simultaneous attachment cases, the IRS prevails. Is this a plausible inference to draw from section 6323(a)? It is not, though much work is needed to vindicate this view.

The exact sentence Justice Scalia quotes says that if the IRS has a lien, it is not good against lien creditors until notice is filed.⁵⁵⁷ Read literally, this sentence could be taken to mean that *all* judgment creditors lose, even if prior in time. Consider the following:

Twelfth Scenario

t_1 : *JC* docketes against *JD*, who owns local real property.

t_2 : The IRS assesses a tax against *JD*.

t_3 : The IRS files notice against *JD*.

The above sentence from section 6323(a), read in isolation, means that *JC* has priority at t_1 and t_2 , because the IRS has not filed notice. But at t_3 , the IRS lien prevails because *no* judicial lien is good against the IRS lien once the IRS has filed notice. Such a reading assumes the validity of a negative pregnant in section 6323(a), which destroys the first-in-time principle that governs federal tax lien priorities.

⁵⁵⁴ *McDermott v. Zions First Nat'l Bank, N.A.*, 945 F.2d 1475, 1477 (10th Cir. 1991), *rev'd sub nom.* 507 U.S. 447.

⁵⁵⁵ 507 U.S. at 453.

⁵⁵⁶ *Id.*

⁵⁵⁷ *Id.*

Such a reading must be rejected for the following reason. According to I.R.C. section 6321, if a taxpayer refuses to pay a tax after demand, "the amount . . . shall be a lien in favor of the United States upon all [taxpayer] property . . . whether real or personal." We learn further in section 6322 that "the lien imposed by section 6321 shall arise at the time the assessment is made." So in our example above, at t_2 the IRS had a lien on *D*'s property, which at this point is only *D*'s equity interest. *JC*'s lien is entirely separate and is no longer the taxpayer's property. *JC*'s lien entirely escapes the jurisdiction of section 6323(a) because section 6323(a) refers only to *taxpayer* property encumbered by the IRS lien. *JC*'s lien is property entirely *unencumbered* by the IRS lien. So whatever section 6323(a) means, it does not upset the principle of "first in time is first in right." In the Twelfth Scenario, *JC* prevails. The IRS is junior.

What then does section 6323(a) say about simultaneous liens? As so often happens at the crucial moments of commercial law, the sentence comprehends only sequence, not simultaneity.⁵⁵⁸ It says nothing at all about simultaneous lien creation.⁵⁵⁹ But section 6323(a) contains *exceptions*. Justice Scalia assumes that these exceptions show that Congress intended a pro-IRS rule in simultaneous creation cases. In fact this is not so.

Let us examine the exception that Justice Scalia himself examines. According to section 6323(b), even though the IRS has filed notice of its lien, certain designated liens still beat the IRS. One of these is provided in section 6323(c)(1): "a security interest which came into existence after the tax lien filing but which— (A) is in qualified property covered by the terms of a written agreement entered into before tax lien filing and constituting (i) a commercial transactions financing agreement."⁵⁶⁰ "Qualified property" means "commercial financing security acquired by the taxpayer before the 46th day after the date of the tax lien filing."⁵⁶¹ "Commercial financing security" is defined to include

⁵⁵⁸ See generally Carlson, *supra* note 374.

⁵⁵⁹ See *S. Rock, Inc. v. B & B Auto Supply*, 711 F.2d 683, 689 (5th Cir. 1983).

⁵⁶⁰ A "commercial transaction financing agreement" is defined as an agreement in the course of trade "to be secured by commercial financing security acquired by the taxpayer in the ordinary course or his trade or business." 26 U.S.C. § 6323(c)(2)(A) (2000).

⁵⁶¹ *Id.* § 6323(c)(2)(B).

inventory, among other things.⁵⁶² Putting all this together, if *SP* has a security agreement with *JD* before the IRS notice is filed and if *JD* acquires inventory after the IRS notice is filed, *SP*'s after-acquired security interest in the inventory is senior to the IRS's after-acquired property tax lien. From this exception Justice Scalia draws the conclusion that section 6323(a)'s opening statement means that in all cases where the above exception and other like exceptions don't apply, the IRS must win in simultaneous attachment cases.⁵⁶³

In fact, Justice Scalia is logically incorrect. The exception in section 6323(c)(1) is consistent with *two* different readings: (1) Without the exception, the IRS is senior to *SP*, or (2) Without the exception, the IRS and *SP* are tied chronologically and should share *pro rata*. Justice Scalia's choice of (1) over (2) was in no way required.⁵⁶⁴

⁵⁶² *Id.* § 6323(c)(2)(C).

⁵⁶³ The majority and the dissent differed strongly on whether the after-acquired property question had already been answered in *United States v. State of Vermont*, 377 U.S. 351 (1964). In *Vermont*, state tax liens attach to real and personal property as soon as a tax warrant is docketed in like manner as a judgment. VT. STAT. ANN. tit. 32, § 9818 (2008). Vermont had obtained a lien against the taxpayer and also had obtained a garnishment of the taxpayer's bank. Thereafter, the IRS obtained a federal tax lien. The *Vermont* court ruled that Vermont had a complete priority to the bank account. Dissenting in *U.S. ex rel. IRS v. McDermott*, Justice Clarence Thomas claimed:

[T]he debtor's interest in the bank account . . . could have been uncertain or indefinite or indefinite from the creditors' perspective. Nevertheless, in [*Vermont*], the particular property was "known to be subject to the [state] lien," simply because that lien, by its terms, applied without limitation to all property acquired at any time by the debtor.

507 U.S. 447, 459 n.2 (1993) (Thomas, J., dissenting) (citation omitted) (third alteration in original). In discussing the bank account, the *Vermont* court "found no need even to mention whether the debtor had acquired its property interest in the deposited funds before or after the notice of the federal lien." *Id.* at 459. In short, according to Justice Thomas, *Vermont* already decided the after-acquired property question, because the bank account *may* have had post-lien dollars in it.

A review of the *Vermont* opinion reveals that the Court was quite oblivious to the fact that post-lien dollars may have been deposited by the debtor in the bank account. The opinion does not indicate whether such post-lien dollars existed. It is highly plausible that the debtor made *no* deposits in a bank account that had already been garnished. If post-lien dollars existed, then Vermont did indeed have a senior lien on after-acquired property. But even this assumes that a bank account is not just one debt owed by the bank (which varies in size over time) but is many different debts, some of which were pre-lien debts, some post-lien.

Justice Scalia took the position that there was no after-acquired property aspect in *Vermont*. *Id.* at 450–51 (majority opinion).

⁵⁶⁴ Justice Scalia is therefore unfair to the dissent when he wrote:

A further criticism is that Justice Scalia properly recognizes that *JC* could not have a lien on *JD*'s property until *JD* actually acquired it,⁵⁶⁵ and he admonishes the dissent for suggesting otherwise.⁵⁶⁶ But then he himself says otherwise with regard to the IRS tax lien.⁵⁶⁷ The tax lien *did* have existence before *JD* acquired the property.⁵⁶⁸ Thus, the meaning of section 6323(a) is that "the filing of notice renders the federal tax lien extant for 'first in time' priority purposes regardless of whether it has yet attached to identifiable property."⁵⁶⁹ So Justice Scalia's sage observation about *JC*'s lien is simply forgotten when it is time to consider the status of the IRS lien prior to *JD*'s acquisition of real property.⁵⁷⁰ Justice Scalia lays bare the fault of the dissent but fails to apply the same criticism to his own position.

I have said that the Supreme Court did not understand the facts of the case before it. Here is what really happened:

*t*₁: *O* grants a mortgage to *JD* to finance the purchase price of \$146,000.

*t*₂: The IRS assesses a tax against *JD* and has a lien on *JD*'s mortgage.

*t*₃: *JC* docketes against *JC* for \$67,000. This lien attaches to *D*'s mortgage and has seniority over the IRS's unperfected lien.⁵⁷¹

*t*₄: The IRS files notice of its lien.

*t*₅: *JD* holds a mortgage foreclosure sale where *JD* is the buyer. *JD* acquires *O*'s equity.⁵⁷²

The dissent contends that "there is no persuasive reason for not adopting as a matter of federal law the well-recognized common-law rule of parity and giving the Bank an equal interest in the property." As we have explained, the persuasive reason is the existence of [section] 6323(c), which displays the assumption that all perfected security interests are defeated by the by the federal tax lien.

McDermott, 507 U.S. at 454 n.7 (citation omitted). In fact section 6323(c) could well assume that security interests are merely *tied* with tax liens and thus consistent with the dissent's "well-recognized common-law rule of parity."

⁵⁶⁵ 507 U.S. at 452–53 (stating that *JC*'s lien "did not actually attach to the property at issue here until [*JD*] acquired rights in that property" and that because "that occurred *after* the filing of the federal tax lien, the state lien was not first in time").

⁵⁶⁶ *See id.* at 452 n.5.

⁵⁶⁷ *See id.* at 453.

⁵⁶⁸ *See id.*

⁵⁶⁹ *Id.*

⁵⁷⁰ *See* William H. Baker, *The McDermott Tax Lien Case: And the First Shall Be Last*, 55 LA. L. REV. 879, 885 (1995).

⁵⁷¹ *See* UTAH CODE ANN. § 78B-5-202 (2008) (originally UTAH CODE ANN. § 78-22-1(2)).

*t*₆: With consent of *JC* and the IRS, *JD* conveys to *X* who pays cash for an unencumbered title. The parties agree that *JC* and the IRS will receive the proceeds according to their priorities.

Properly, the case does *not* involve simultaneous attachment of two liens. Rather *JD*'s mortgage was encumbered *in sequence* by the IRS (*t*₂), then by *JC* (*t*₃). *JC*, second in time, was first in right under section 6323(a).⁵⁷³ Thereafter, *JD* acquired *O*'s equity (at *t*₅). Ordinarily, when a mortgagee bids in, her unencumbered mortgage merges with the debtor's unencumbered equity, creating a fee simple in the mortgagee.⁵⁷⁴ Here, merger is prohibited by the liens of *JC* and the IRS. Therefore, *JC*'s senior judicial lien survives to encumber part of *JD*'s title. As to the equity acquired in the foreclosure sale, this was genuine after-acquired property, in so far as *JC* and the IRS were concerned. Under the Supreme Court's holding, ties go to the IRS. The IRS was senior as to the equity, but nevertheless subordinated to *JC*, who had a prior lien on the mortgage portion of *JD*'s title.

Although we are not told the amount *X* paid for the unencumbered title, we do know that *JC*'s lien was for about \$67,000⁵⁷⁵ and *JD*'s mortgage in 1981 was for \$146,000.⁵⁷⁶ If the mortgage was amortized over 30 years, which is certainly standard, then there would have been little amortization, especially since *O* had been in default for some time. Therefore, it is highly likely that *JC* could have been paid out entirely from that portion of *X*'s money which represented the purchase price of *JD*'s mortgage. And if *X* paid less than the amount of *JD*'s mortgage,⁵⁷⁷ then there would have been no surplus at all to fund the IRS. It is very likely, then, that *JC* was first in time and therefore first in right.

⁵⁷² See *McDermott v. Zions First Nat'l Bank, N.A.*, 945 F.2d 1475, 1477-78 (10th Cir. 1991), *rev'd sub nom. U.S. ex rel. I.R.S. v. McDermott*, 507 U.S. 447 (1993).

⁵⁷³ The lower court needlessly worried whether a Utah judicial lien could attach to a vendor's interest following a real estate contract. *Id.* at 1479 n.5. Indeed, the Utah Supreme Court would later rule in the negative. *Cannefax v. Clement*, 818 P.2d 546, 550 (Utah 1991). According to *Cannefax*, a vendor holds legal title in real estate in trust for the buyer pending the closing. See *id.* at 550. Be that as it may, in *McDermott*, *D* held a trust deed to secure payment of the real estate contract, and *JC*'s lien could attach to this. *McDermott*, 945 F.2d at 1477.

⁵⁷⁴ This assumes there are no senior mortgages on *O*'s equity.

⁵⁷⁵ *McDermott*, 945 F.2d at 1477.

⁵⁷⁶ *Id.*

⁵⁷⁷ Which may well have been the case, as 1987 was the start of a severe real estate recession.

Be that as it may, to quote King Richard, "After our sentence plainning comes too late."⁵⁷⁸ "Things without all remedy/Should be without regard: what's done is done."⁵⁷⁹ Thanks to *McDermott*, New York *JCs* can expect to win when genuinely first in time with regard to already-acquired property, but in simultaneous attachment cases involving after-acquired property, they lose. Oddly, *McDermott* is the mirror image of *Farrey v. Sanderfoot*,⁵⁸⁰ which concerned the power of a debtor to avoid judicial liens that impair the homestead exemption.⁵⁸¹ There, where *JC* claims after-acquired property, *JC* wins.⁵⁸² But where *JC* competes against a simultaneous federal tax lien for after-acquired property, *JC* loses.⁵⁸³ Both these holdings are absurd. The Supreme Court has created a topsy-turvy world for New York *JCs* claiming a debtor's after-acquired real property.⁵⁸⁴

CONCLUSION

In this Article, I have analyzed judicial liens in New York real property. The law pertaining to such liens has been revealed to be full of contradictions and idiotic caprice. But in the main, civilization in New York seems to have struggled along tolerably well. For all its problems, the real estate regime for judicial liens is in fact blissfully simple, compared to the personal property regime. But that particular parade of absurdities must await the sequel.

⁵⁷⁸ WILLIAM SHAKESPEARE, *RICHARD II* act 1, sc. 3., at 29 (John Seeley et al., eds., Heinemann 2000).

⁵⁷⁹ WILLIAM SHAKESPEARE, *MACBETH* act 3, sc. 2, at 50 (The Riverside ed., Houghton, Mifflin & Co. 1897).

⁵⁸⁰ 500 U.S. 291 (1991); see also *Owen v. Owen*, 500 U.S. 305, 314 (1991) (Scalia, J.) (remanding to determine whether judicial lien was simultaneously created with the exempt property, making it unavoidable).

⁵⁸¹ *Farrey*, 500 U.S. at 292.

⁵⁸² *Id.* at 301.

⁵⁸³ *Marine Midland Bank v. Scarpino (In re Scarpino)*, 113 F.3d 338, 342 (2d Cir. 1997).

⁵⁸⁴ In *Advantage Title Agency, Inc. v. Karl*, 363 F. Supp. 2d 462, 463-64 (E.D.N.Y. 2005), *JC* and the IRS had docketed and filed notice respectively before *JD* inherited property. *JD* renounced the inheritance. *JC*, however, claimed that *JD* was mentally incompetent when *JD* renounced (though the renunciation would seem to be evidence of acute powers of reason). *Id.* at 464. The court gave summary judgment to the IRS; even if *JD* was insane, the IRS won on the strength of the *McDermott* holding. *Id.* at 467.

It is easy to imagine some reforms to make the system more rational. I would like to propose six such reforms, all of them painless.

(1) For starters, the Legislature should repeal CPLR 5203(b), since section 5236(a) already enables a sale to proceed if an execution is served while the docketing lien is alive. Section 5203(b) also tolls a docketing lien during the time enforcement is injunctively stayed. So long as the judgment outlives the docketing lien, preservation of this feature is desirable, but an even better idea is to follow the advice of the Office of Court Administration⁵⁸⁵ and make the docketing lien coterminous with enforceability of the judgment itself. Such a reform would permit repeal of the concept of the action on the judgment, which has recently proven conceptually confusing and dangerous for *JCs*. It would also make advisable changing the rule on *levying* upon real property so that, as an alternative to docketing judgments elsewhere, *JC* could obtain a lien on real property located outside the county of the judgment roll simply by serving an execution on the sheriff.

(2) Another easy reform is to add back into the CPLR a redemption right, but one that lapses at the time of the execution sale. This simply borrows from the law of New York mortgages.

(3) Currently, CPLR 5236(c) delegates to *JC* the job of creating a list of those entitled to notice of an execution sale. Such a delegation is undoubtedly unconstitutional. The Legislature might then step up to the plate and require the sheriff to establish the list. Furthermore, distribution under section 5236(g) is limited to *JCs* who have served executions and *JDs*. Although the provision has a wildcard in it, permitting judges to do whatever they think best, the provision should be amended to invite anyone with a foreclosed interest to apply for the surplus.

(4) Another matter that needs attention is the holding in *First Federal Savings & Loan Ass'n v. Brown*.⁵⁸⁶ According to *Brown*, *JD* loses all right to the real estate exemption when a senior mortgage lender forecloses a judicial lien creditor.⁵⁸⁷ Rather, the rule should be that *JD* obtains from the proceeds of a

⁵⁸⁵ See Memorandum of Office of Court Administration, reprinted in Ch. 123, 1986 N.Y. Laws 3379 (McKinney); see also *supra* note 121 and accompanying text.

⁵⁸⁶ 78 A.D.2d 119, 434 N.Y.S.2d 306 (4th Dep't 1980).

⁵⁸⁷ See *id.* at 123, 434 N.Y.S.2d at 310.

mortgage foreclosure the amount of the exemption, up to the amount of *JC*'s right to a distribution.

(5) Some ancient state cases and some modern federal cases hold that where *JD* makes a fraudulent conveyance of real property to *X* and *JC* docketes against *JD*, *JC* has a lien against *X*'s property. This rule, if it still exists, creates havoc for title searching, since *JC*'s lien does not appear in the docket against *X*. To be sure, the title searcher will be able to trace *X*'s rights back to *JD*, but what the title searcher will observe is that *JD* conveyed to *X* before *JC* docketed. The title searcher has no easy way of determining whether *JD*'s conveyance was fraudulent or not. Rather, the rule should be that *JC* must commence an action against *X* and publicize it with a notice of pendency. Until then, *JC* has no lien against *X*'s property.

(6) Currently, the sheriff may not garnish tenants of *JD*. Rather, *JC* must obtain a receiver to collect rents. There is no justification for this technicality and it is deserving of abolition.